

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF &  
APPENDIX**



75-1393

B  
PMS.

To be argued by  
AR MENDE LESSER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

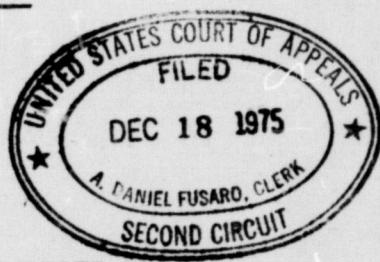
Plaintiff-Appellee,

-against-

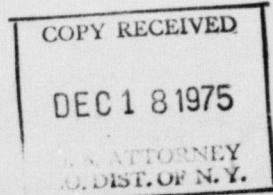
JOE TRUMAN BOYD et al.,  
M.S. KNISELY,

Defendants-Appellants.

-----x  
BRIEF AND APPENDIX FOR DEFENDANT-  
APPELLANT M.S. KNISELY



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## TABLE OF CONTENTS

	<u>Page</u>
<b><u>BRIEF</u></b>	
Preliminary Statement.....	1
Indictment.....	2
Statement of Facts.....	4
Questions presented.....	11
<b><u>Point I</u></b>	
Whether the judgment of conviction is factually supported by the record beyond a reasonable doubt.....	12
<b><u>Point II</u></b>	
Whether there in fact was a con- spiracy to violate the Securities Act of 1933.....	19
Conclusion.....	20
<b><u>APPENDIX</u></b>	
Docket entries.....	1a
Indictment.....	2a
Charge by the Court.....	16a
<b>WITNESSES:</b>	
Alan Segal.....	68a
William C. Chapel.....	73a
Bill G. Elms.....	77a

TABLE OF CONTENTS - continued

	<u>Page</u>
Roscoe Maxson.....	79a
Robert E. Ford.....	82a

UNITED STATES COURT OF APPEALS  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

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M.S. KNISELY,

Defendants-Appellants.

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BRIEF AND APPENDIX FOR DEFENDANT-  
APPELLANT M.S. KNISELY

Preliminary Statement

Defendant, M. S. Knisely, appeals from a judgment of conviction rendered after trial before United States District Judge Milton Pollack and a jury, convicting him of conspiracy (Count One) the use of interstate commerce, the wire service and the mails for the purpose of sale and delivery after sale of stock of Select Enterprises, Inc. (Counts Two through Twenty-Eight); the use of artifices, false and

fraudulent representations in connection with the sale of stock (Counts Twenty-Eight through Forty); use of means and instruments of transportation and communication in interstate commerce in the sale of unregistered stock (Counts Forty-One through Fifty-One); and false, fictitious and fraudulent statements with respect to said Select Enterprises stock (Counts Fifty-Two through Fifty-Three), and the sentence of five years, of which he would serve two months in prison and the balance remaining on probation.

Timely notice of appeal was filed, and by directive and pursuant to the rules of this court, Armende Lesser was directed to prosecute this appeal as counsel for this defendant-appellant. Execution of the sentence was stayed conditioned on the posting of Five Thousand (\$5,000.00) dollars in cash or acceptable surety bond in a similar sum pending the determination of this appeal.

Indictment

The indictment in substance alleges:

1. A conspiracy between sixteen named defendants and four co-conspirators involving the sale and distribution of Select Enterprises stock, a Nevada

corporation described as a corporate shell without any substantial assets (Count One);

2. That defendants Boyd, Joiner, Goodloe, Ford, Weber, Titlow, Mullenax, Knisely, Brookshire, Barnett, Rappaport, Schlager, Vanesco, Segal, Bissett and Wells, unlawfully, wilfully and knowingly by the use of instrumentalities of interstate commerce and of the mails in connection with Select Enterprises stock did:
  - (a) Employ devices, schemes and artifices to defraud,
  - (b) Made untrue statements of material facts and omitted to state material facts,
  - (c) Engage in acts and practices which operated as a fraud and deceit upon purchasers of Select Enterprises stock (Counts Two through Twenty-Eight).
3. That the same defendant unlawfully, wilfully and knowingly offered for sale shares of Select through devious means, schemes and devices and did actually engage in transactions, which operated as a fraud and deceit upon purchasers of said securities (Counts Twenty-Nine through Forty).
4. That the same defendants unlawfully, wilfully, and knowingly used the mails and wire services to sell Select shares wherein no registration statement was in effect with the Securities and Exchange Commission.
5. That the same defendants did unlawfully, wilfully and knowingly make false and fictitious statements in writing in matters within the jurisdiction of the Securities and Exchange

Commission (Counts Fifty-Two and Fifty-Three).

Statement of Facts

The indictment charges sixteen named defendants and a seventeenth defendant named in a separate indictment and consolidated for trial, together with four co-conspirators with fraud and conspiracy involving the stock of Select Enterprises, Inc. ("Select"), a Nevada corporation, the shares of which were traded in the public marketplace. Select was the successor of a Nevada corporation organized in 1915 in the State of Nevada under the corporate title of Goldfield Candelaria Cooperative Mining Corporation.

Defendant, to accommodate his friend and principal in this venture, Joe Truman Boyd ("Boyd"), became temporary president of Select. Three defendants, Alan Segal ("Segal"), James Calvin Joiner ("Joiner") and John Wells ("Wells"), pled guilty to various charges; defendant Selwyn Weber ("Weber") became ill during the trial and his case was severed; one defendant was not called to this trial, leaving twelve defendants before this court.

The Government produced thirty-eight witnesses

on its direct case. Of these only one witness mentioned Knisely during direct testimony, and four testified to Knisely's lack of participation on cross examination. The Government's case in this memorandum is necessarily limited to its relevance to the finding of guilt as to Knisely.

Alan Segal, for the Government, testified that on or about January 1970 he met Joiner and Boyd and discussed with them the possible sale of Select stock in the over-the-counter market in New York. He traced the various activities between Boyd, Joiner, co-conspirators Joseph Azzarone, Fred Sherman, Stuart Shiffman and Michael Karfunkel with the resultant sale of some 100,000 shares of Select. Segal, to give Select some substance, arranged for the merger into Select of the Riverside Hotel and Diamond Bros. Furniture Company, transactions that required the signature of the president of Select. This is the only instance where Knisely was mentioned. In this connection the witness testified:

Q Mr. Segal, did you have some telephone conversation or conversations with respect to obtaining the signature on those contracts on behalf of Select Enterprises?

A I called Mr. Joe Boyd immediately and I wanted to fly to Texas to have these things signed or ask Mr. Boyd to please come into New York, if he could.

He told me that that would be impossible, that he was going to Washington to retain a law firm or he is in Washington or something like that, to retain a law firm and the first available chance that he would have Mr. Knisely available for signature would be Sunday, whatever date that was and I believe it was March 1st, and we arranged to meet at a motel, one of the either Holiday Inn's or Sheridan's or something, a name motel but I can't remember which chain in Texas, so all this can be completed.

On Sunday, March 1, 1970, he traveled to Texas and met with Mr. Joe Boyd and Mrs. Boyd and Mr. Knisely, and they signed the documents: the appointment was set up early in the week and they signed the documents that Sunday for Select's purchase of Diamond Bros and Select's purchase of Riverside Hotel (68a).

On cross examination this witness verified that on December 18, 1974, he testified before the Grand Jury as follows:

Q Did you thereafter fly to Texas to obtain signatures of someone on behalf of Select?

A Yes. The very next day I flew to Texas to Mr. Boyd who had Mr. Knisely

sign both contracts so that I could take it back and get it to the brokers' office the following morning at 9 o'clock, delivered to their door, so that they would have it available for the Securities and Exchange Commission when they were supposed to attend a hearing.

Q Did you have Dr. Knisely sign the contract or did you give it to Mr. Boyd?

A I gave it to Mr. Boyd...His (Knisely's) function was to sign the contracts.

Q Did you have any contact with Dr. Knisely with respect to the contents of any of these transactions?

Not at all. (Interlineation supplied.)

William C. Chapel, a witness on behalf of the Government, testified that in the early part of 1970 he as president of Economic Management Services negotiated a deal with Boyd providing for the acquisition of this company by Select on a stock trade basis. Subsequently he worked with Boyd in the preparation of the progress letter signed by Knisely (Exhs. 4 and 4A) and a flyer outlining the various properties acquired by Select to support the claimed valuation of Select as a corporate entity ( ). He attended a number of meetings including the Board of Directors held on March 26, 1970, though he was neither a director or an

officer of Select.

This witness did not mention Knisely either by name or office in Select throughout his direct testimony.

On cross examination he testified that he knew Knisely for many years and that he (Chapel) arranged for a loan of \$15,000.00 with a Texas bank using as part of the collateral 50,000 shares of stock of United American Industries that belonged to Knisely (74a). In response to counsel's question as to whether Knisely received any part of the proceeds of the loan, the answer was "no".

This witness appeared before the Grand Jury in connection with Select on December 19, 1974, where he was asked the following questions by Mr. McDonald (the Assistant United States attorney representing the Government in this trial):

Q Finally, do you know Mr. Knisely?

A Yes.

Q Can you tell us what his role was with respect to Select Enterprises?

A Well, he, on wherever I saw a sheet of paper of any kind with his name or the president on it, it always said Dr. Mike Knisely, president, so I assumed he was the president of the corporation.

However, I -- his part, the part that he played, as far as I can tell, was an inactive one, because I don't remember ever seeing him in the various Select offices or I don't believe I ever saw him with Joe Boyd in regard to Select Enterprises."

Do you remember giving those answers to those Questions?

A Yes, I do.

Q Was that the true situation?

A It is essentially true. However, may I make a slight qualification?

Q Answer the question.

THE COURT: What is the part that is not essentially true?

THE WITNESS: The part I would change would be relative to the fact that I did in fact see him at the Abilene meeting.

Q He didn't participate in any discussion, did he?

A I don't recall him participating at all.

Bill G. Elms on behalf of the Government

stated that he was introduced to Boyd by Weber as an accountant for Select. The witness identified a balance sheet of Select together with a covering letter prepared by him and Knisely's memorandum to the Board of Directors that Elms and Company were retained as accountants for the company (Government's Exh. 1).

On cross examination the witness admitted that

he did not "know Dr. Knisely, the signer of that letter" and that he was not present during any conversations (1356, 11. 2-4)(78a)

Roscoe Maxson, called on behalf of the Government, detailed his negotiations with Boyd which resulted in the acquisition of an office building in exchange for Select stock. Knisely was in no way involved in the discussions nor was he mentioned by this witness other than a phone call on April 15, 1970.

Maxson testified that Knisely called him concerning some papers that he received, "and he (Knisely) didn't know what they were all about (80a). Maxson advised him to discuss them with Boyd and that when Knisely left the office he neglected to take the papers with him (80a). The papers were never returned to Knisely and were subsequently turned over to the United States attorney by Maxson's attorney. He did, however, voluntarily add that Knisely "is a very fine fellow" (81a).

Robert E. Ford, testifying in his own behalf, stated that he represented Boyd during the change of name and the emergence of Select Enterprises as a viable company. The full range of the testimony of this witness will undoubtedly be covered in a brief

submitted on his appeal and the appeal of other defendants.

The only mention of Knisely by this witness was in connection with the Board of Directors meeting of March 26, 1970, at Ford's office. In response to a question by counsel as to who chaired this meeting, Ford answered, "Joe Boyd" (1794).

On cross examination in response to:

Q Did he (Knisely) participate in that meeting in any way so far as you remember?

A Except by his physical presence, no. (1993, 11. 11-13)

Questions Presented

I

Whether the judgment of conviction is factually supported by the record beyond a reasonable doubt.

II

Whether there in fact was a conspiracy to violate the Securities Act of 1933.

I

Whether the judgment of conviction  
is factually supported by the  
record beyond a reasonable doubt.

This circuit has consistently held that a conviction for conspiracy cannot stand absent some evidence that the alleged co-conspirator knowingly and wilfully became a participant in the conspiracy, United States v. Johnson, 513 F. 2d 819, 823 (1974); United States v. Cirillo, 499, F. 2d 872, 883 (1974); United States v. Infanti, 474 F. 2d 522, 526 (1973); United States v. Amino, 321 F. 2d 509 (1963).

In Johnson, supra, this court considered fully the minimal proof required to support a charge that the defendant was an aider and abettor and a member in a conspiracy.

Johnson was a passenger in an automobile owned and operated by Loewe when the drug was found inside the panel of the passenger door; Johnson knew that Loewe was on probation for grand larceny and was not allowed to leave the United States; Johnson made false statements to the custom agents and that he lied to the arresting officers. This court rejected the

Government's argument "that the accumulative weight of the evidence of Johnson's presence in Loewe's automobile at the time the drugs were found, his close association with Loewe, his false exculpatory statements and his general lack of credibility were sufficient from which the jury could properly find or infer beyond a reasonable doubt, that the accused is guilty (citing cases). The decision continued (p. 823):

It is well established, however, that in order to be an aider and abettor, the defendant must associate himself with the venture in some fashion, "participate in it as something that he wishes to bring about," or "seek by his action to make it succeed." United States v. Peoni, 100 F. 2d 401, 402 (2 Cir. 1928). See also Nye & Nissen Corp. v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 (1949); United States v. Terrell, 474 F. 2d 872, 875 (2 Cir. 1973).

The rule is similar with respect to establishing membership in a conspiracy. See United States v. Cirillo, 499 F. 2d 872, 883 (2 Cir. 1974) ("There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed"); United States v. Cianchetti, 315 F. 2d 584, 588 (2 Cir. 1963) (co-conspirator must make an "affirmative attempt" to further the purposes of the conspiracy); United States v. Falcone, 109 F. 2d 579, 581 (2 Cir. 1940) (co-conspirator must "promote [the] venture himself,...have a stake in its outcome").

In Cirillo, supra, the court held at page 883:

...mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare United States v. Amino, 321 F. 2d 509 (2d Cir. 1963), cert denied, 375 U.S. 974, 84 S. Ct. 491, 11 L.Ed. 2d 418 (1964) ("mere meeting was no evidence [that persons were] conspirators") and United States v. Fantuzzi, 463 F. 2d 683 (2d Cir. 1972) with United States v. Cassino, 467 F. 2d 610 (2d Cir. 1972), cert. denied, 410 U.S. 913, 93, S.Ct. 959, 35 L.Ed. 2d 276 (1973).

In Garguilo, supra, the court reversed the conviction of one of the defendants, Macchia, despite some evidence that Macchia was close enough to the transactions, to the conversations, to the general atmosphere of the transactions to know what was going on. The reversal was predicated on the general requirement "that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were convinced beyond a reasonable doubt that Macchia was doing something to forward the crime--that he was a participant rather than a knowing spectator (254)."

In the same context specifically with respect to aiding and abetting this court held:

...But knowledge that a crime is being

committed, even when coupled with presence at the scene, is generally not enough to constitute aiding and abetting. In Nye & Nissen v. United States, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 (1949), the Supreme Court said, quoting Judge Learned Hand in United States v. Peoni, 100 F. 2d 401, 402 (2 Cir. 1938).

"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'"

Infanti, supra, involved a conspiracy to sell stolen securities. Kurtz, accompanied by Infanti traveled together to Frankfurt, was present in a hotel room during discussions with prospective purchasers, then went to London after negotiations broke off. No proof was presented that Kurtz knew the securities were stolen, nor that he could set a price for them, nor did he have any say as to their transfer sufficient to infer constructive possession. The court dismissed the conspiracy count and the Government withdrew the aiding and abetting charge.

This court, in reversing Kurtz's conviction, held:

Thus, the Government must rely on evidence other than Kurtz's actual or constructive possession to establish that he knew the securities were stolen. It is true that the circumstances of the proposed stock transfer were surreptitious and it would have been obvious to Kurtz, a lawyer, that

Infanti's dealings were less than legitimate. But Kurtz's presence in the hotel room and the lack of evidence of his participation in the conversations that occurred there--at some point Infaniti said to him, "Not now, Nat," or words to that effect--do not establish the conclusion beyond a reasonable doubt that he was aware that the securities were stolen. Cf. United States v. Garguilo, 310 F. 2d 249, 253 (2d Cir. 1962); United States v. Minieri, *supra*, 303 F. 2d at 557 (aiding and abetting not proven from presence where an illegal act occurs). Without some further evidence of the quality of his participation, Kurtz's presence where illegal activity was being transacted does not establish his knowledge of the nature of the activity. See United States v. Cianchetti, 315 F. 2d 584, 588 (2d Cir. 1963).

At bar there is not one iota of testimony that this defendant purposely and deliberately entered into any agreement with a particular purpose and specific intent to do that which the law forbids. Absent evidence that he acted wilfully and knowingly, conviction for conspiracy cannot stand. The only overt act supported by this record is the affixing of his signature to the Riverside and Diamond Bros. contracts and his signature as president to the Elms letter (Exh. 1), the news release (Exh. 4), the Board of Directors matters (Exh. 4) and Select flyer (Exh. 5). The physical fixation of his signature without knowing what the contents contained,

without participating in the negotiations leading to the subject matter of the exhibits is not sufficient to make him a party to the alleged conspiracy.

This record does not contain sufficient evidence from which the jury could have found that a conspiracy or a criminal venture existed between Knisely and the remaining defendants. It does not contain a single word of conversation testimony. The only independent evidence presented was the fixation of his signature as president to documents prepared by others, wherein he had absolutely no personal knowledge. Absent the vital elements of knowledge and wilfulness, the charge of conspiracy cannot stand. At most, this evidence could support a finding of an overt act. Such an act, however, without proof of participation is not enough to establish a conspiracy (United States v. Williams, 503 F. 2d 50 [6th Cir. 1974]; United States v. Craig, 522 F. 2d 20 [6th Cir. 1975]).

Similarly in Williams (supra), the court stated (at page 54):

[8] With regard to Williams, Jr., we also find the record lacking in any evidence that he entered into an agreement with Williams, Sr. Nor do we find any evidence that Johnson and Williams, Jr. committed the overt act in the motel room with the knowledge that it was in furtherance of

the alleged object of the conspiracy.

In another context involving a narcotics conspiracy, this court very recently distinguished between a major participant and a peripheral figure by applying the doctrine enunciated in the single act line of cases specifically stating:

We think he is entitled to the benefit of the single act line of cases, led by United States v. Reina, 242 F. 2d 302, 306 (2d Cir.), cert denied, 354 U.S. 913, 77 S.Ct. 1294, 1 L.Ed. 2d 1427 (1957), the one most specifically in point being United States v. Aviles, 274 F. 2d 179, 190 (2d Cir.), cert. denied, Evola v. United States, 362 U.S. 974, 80 S.Ct. 1057, 4 L.Ed. 2d 1009 (1960). See also United States v. DeNoia, 451 F. 2d 979 (2d Cir. 1971). This was a large, multi-party conspiracy extending over a period of years. Alonzo's dealings were on one occasion only, with a lesser figure, for a small amount. Viewed in the entire context of the conspiracy his act qualitatively is minuscule. True, he indicated that he had been a dealer before and that he wanted to start dealing again, but he made no other purchase. True also, he was present at the apartment when Pannirello made a delivery to Basil Hansen, but presence alone is not enough. See United States v. Terrell, 474 F. 2d 872, 875-76 (2d Cir. 1973). When the Government throws out its big conspiracy net to catch the big fish in the criminal sea, it has to be aware that an occasional minnow may wriggle free.

(United States v. Tramunti, 513 F. 2d 1087  
[2d Cir. 1975])

It is therefore submitted that his mere presence without proof of knowledge, without proof of wilfulness,

without proof of doing something in furtherance of the venture, is not the evidence beyond a reasonable doubt sufficient to sustain the conviction for conspiracy nor of aiding and abetting.

II

Whether there in fact was a conspiracy to violate the Securities Act of 1933.

The question of law implicit in the charge set forth in Count One with respect to the Securities Act of 1933, and more particularly as to whether it is applicable to outstanding stock issued prior to 1933, will be covered in the arguments advanced by all other appellants in this matter. In view of the position of appellant Knisely that he was never a participant in the charged conspiracy and that his posture in this case is, to say the least, marginal, the question of law will not be further pursued in this memorandum. He, however, adopts and incorporates by reference the arguments of all other appellants as a further point in support of this appeal.

Conclusion

The Government failed to establish that this defendant directly or indirectly, circumstancially or inferentially participated in a plan to accomplish an unlawful act. The law clearly requires more than this record reveals to support a conviction for conspiracy. This record is completely devoid of material facts; conversation testimony; direct participation in direction, in policy, in everyday activity of a chief executive officer, or to say the least, chairman of the meeting. The record amply supports the characterization of this defendant by the prosecution as the "friend" and the "tool" of Boyd.

The guilt of Knisely was not established beyond a reasonable doubt. The conviction should be reversed.

Respectfully submitted,

ARMENDE LESSER  
Attorney for Defendant-  
Appellant

APPENDIXDocket Entries

The docket entries were not available because of the physical moving of the appeals division of the clerk's office, and will, therefore, not be reproduced in this appendix. The appeal clerk stated that they may be eliminated since the docket entries will be incorporated in other appendices and will also be filed with the complete record with the Clerk of the Circuit Court of Appeals.

2a  
WCM:dc  
10-26-70  
H-90

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

- v - :

JOE TRUMAN BOYD, :  
JAMES CALVIN JOINER, :  
ERNEST DARWIN GOODLOE, :  
ROBERT E. FORD, :  
SELWYN WEBER, : INDICTMENT  
EMERSON P. TITLOW, :  
ERNEST R. MULLENAX, :  
M. S. KNISELY, :  
HOWARD L. BROOKSHIRE, :  
WILLIAM WAYNE BARNETT, :  
MARVIN J. RAPPAPORT, :  
STANLEY SCHLEGER, :  
EDWARD VANASCO, :  
ALAN SEGAL, :  
ROGER BISSETT, and :  
JOHN WELLS, :  
Defendants. :  
-----x

75 Cr. 140 (HP)  
(75G. 346 (HP))

The Grand Jury charges:

Introduction

1. At all relevant times herein, Select Enterprises Inc. ("Select"), was a corporate shell without substantial assets the shares of which were not registered for trading as required with the United States Securities and Exchange Commission (SEC).

2. At all relevant times, the defendants SELWYN WEBER ("WEBER"), ROBERT E. FORD ("FORD"), ROGER BISSETT ("BISSETT") and MARVIN J. RAPPAPORT ("RAPPAPORT") were attorneys admitted to practice law in their respective home States of Texas, Nevada and New York.

3. At all relevant times, the defendants WILLIAM WAYNE BARNETT ("BARNETT") and STANLEY SCHLEGER ("SCHLEGER") were public accountants, certified as such by the States of Texas and New York, respectively.

4. At all relevant times, the defendant HOWARD L. BROOKSHIRE ("BROOKSHIRE") was the President of the First Bank in Atoka, Atoka, Oklahoma.

5. At all relevant times, the defendants JOE TRUMAN BOYD ("BOYD"), JAMES CALVIN JOINER ("JOINER"), ERNEST DARWIN GOODLOE ("GOODLOE"), M. S. KNISLEY ("KNISLEY"), EMERSON F. TITLOW ("TITLOW"), ERNEST R. MULLENAX ("MULLENAX") and ALAN SEGAL ("SEGAL") were not regularly employed.

6. At all relevant times, the defendant JOHN WELLS was employed as a securities trader by Crown Trading Co., a Brooklyn, New York, securities broker-dealer registered as such with the S.E.C.

7. At all relevant times, the defendant EDWARD VANASCO ("VANASCO") was an undisclosed principle of Karen Co., a New York, New York, securities broker-dealer registered as such with the S.E.C.

8. This Introduction is hereby incorporated and realleged in each count of this Indictment as if fully set forth therein.

COUNT ONE

I. The Conspiracy

1. From on or about the 1st day of October, 1969, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, BOYD, JOINER, GOODLOE, FORD, WEBER, TITLOW, MULLENAX, KNISLEY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS, the defendants and Joseph Azzarone, Fred Sherman, Stuart Shiffman and Michael Karfunkel, named herein as co-conspirators but not as defendants, and other persons to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to defraud the United States and to violate Sections 1001,

1341 and 1343 of Title 18, United States Code and Sections 77c, 77d and 77e of Title 15, United States Code.

II. The Object of the Conspiracy

2. The object of the conspiracy was to obtain control of a "shell" corporation without any substantial assets, inflate artificially its price, and sell, pledge and distribute the shares at enormous profits to members of the public without providing material information required to be furnished by law.

III. The Means By Which The Conspiracy Was Carried Out

3. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:

(a) The defendant TITLOW, in an attempt to evade the registration requirements for the distribution of stock acquired stock of a corporation which stock had been originally distributed prior to 1933, and which stock under certain limited circumstances, not here applicable as the defendants well knew, need not have been registered. The defendant TITLOW then reactivated the theretofore dormant shell, caused its name to be changed to Select, and agreed to act as the agent for the transfer of its securities.

(b) The defendant BISSETT certified a false statement of the capital structure of Select and issued his opinion letter in respect of its verification and validity.

(c) The defendants KNISELY and WEBER became the President and Secretary, respectively, of Select.

(d) All of the defendants and co-conspirators agreed to distribute thousands of shares of Select stock to lenders, brokers and purchasers throughout the United States and abroad, and to aid one another in such distributions, without filing a registration statement with the S.E.C.

(e) The defendant BOVD transported thousands of unregistered Select securities in interstate commerce

from Reno, Nevada, to New York, New York, in order to create an artificial market in Select stock.

(f) The defendants GOODLOE, BOYD, and KNISEL placed "assets" of insubstantial value and unproven worth into Select.

(g) The defendants SEGAL, VANASCO and WELLS manipulated the price of Select stock by artificial means, including but not limited to the following:

(i) The defendants SEGAL and VANASCO, together with co-conspirator Azzarone, caused Karen Co. to become an apparent market maker in Select.

(ii) The defendant SEGAL, together with co-conspirator Karfunkel, caused Economic Planning to become an apparent market maker in Select.

(iii) The co-conspirator Karfunkel, distributed 1000 Select shares at a \$8.00 per share while the price being quoted the public was approximately \$16.00 per share.

(iv) The defendant SEGAL, through nominees, caused sham "crossed" trades or "wash" sales of Select securities at wholly artificial prices.

(v) The defendant WELLS caused Crown Trading Co. to become an apparent market maker in Select.

(h) The defendants BOYD, SEGAL, FORD, WEBER, BARNETT, KNISEL, RAPPAPORT, SCHLEGER, and VANASCO, together with co-conspirators Schiffman, Karfunkel, Azzarone and Sherman, made false, fictitious and fraudulent statements and representations, and made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, as to material facts in connection with the S.E.C. investigation of Select and to induce the S.E.C. not to suspend trading in the stock, and not to continue any such suspension, so that the defendants would be able to continue their fraudulent distributions. Such false statements included but were not limited to:

- (i) fraudulently prepared and back-dated contracts between Select and others and fraudulently prepared corporate records including minutes, contracts, financial statements, transfer records and press releases;
- (ii) false oral testimony and unsworn statements given to the S.E.C. concerning the above documents.

(i) The defendants BROOKSHIRE, BOYD, JOINER, SEGAL and MULLENAX, together with co-conspirators Schiffman and Sherman, sold, pledged and otherwise disposed of Select stock to lenders, factors and purchasers.

(j) The defendants and their conspirators fraudulently prepared Select financial statements which were false and misleading for at least the following reasons:

- (i) The assets shown on the balance sheets had not, in fact, been transferred into the company as of the date of the balance sheet.
- (ii) The value of the assets set forth on the balance sheets were fraudulently inflated.

#### IV. Overt Acts

4. In furtherance of the said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed the following overt acts among others in the Southern District of New York and elsewhere:

- (1) In or about January 26, 1970, the defendant BOYD carried from Reno, Nevada, to New York, New York 1,036,603 shares of Select stock, delivered 100,000 shares to the defendant SEGAL in nominee names, and then locked the balance into a safe deposit box under their

control. The safe deposit box was locked by two different locks. BOYD and SEGAL each had one separate key and the box could not be opened without both keys.

(2) On or about February 4, 1970, co-conspirator Azzarone filed an application form with the National Quotation Bureau ("Pink Sheets") for the purpose of publishing artificial prices for Select stock.

(3) On or about February 11, 1970, the defendant SEGAL delivered 3,000 shares of Select stock to the President of Mann & Co.

(4) On or about February 26, 1970, the defendants RAPPAPORT, SEGAL, and SCHLEGER, together with co-conspirator Sherman, prepared, back-dated and delivered documents, purporting to be contracts evidencing true business activities of Select, to the S.E.C. through co-conspirator Azzarone and others.

(5) On or about March 1, 1970, the defendant SEGAL flew to Texas to obtain the signatures of the defendant KNISELY on the aforementioned back-dated contracts.

(6) On or about March 9, 1970, the defendants BOYD and WEBER delivered signed copies of the aforementioned backdated contracts to the S.E.C. at which time BOYD made perjurious statements as to such false documents.

(7) On or about March 28, 1970, the defendants BOYD, FORD, BARNETT and KNISELY fraudulently prepared, issued and caused the issuance of false and misleading certified financial reports to shareholders of Select and the trading public.

(8) On or about April 17, 1970, after the termination of the S.E.C. suspension of trading in Select stock and for the purpose of promoting continued distribution and trading in such stock on behalf of all defendants, the defendants BOYD and FORD supplied false and fraudulent information to the S.E.C.

8a

(9) In or about the week ending May 9, 1970, the defendant WELLS provided false and misleading information as to the Select trading market to purchasers, banks, pledgees and other lenders as well as to the S.E.C.

Each of the mailings, telephone and telegraph usages alleged in Counts Two through Twenty-eight of this Indictment are repeated and realleged herein as overt acts.

V. Statutory Allegations

5. It was further a part of said conspiracy that the defendants would, in a matter within the jurisdiction of a department and agency of the United States, to wit, the S.E.C., knowingly and willfully falsify, conceal and cover up by tricks, schemes and devices material facts, make false, fictitious and fraudulent statements and representations, and make and use false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in violation of Title 18, United States Code, Section 1001.

6. It was further a part of said conspiracy that the defendants, having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, would unlawfully, wilfully and knowingly and for the purpose of executing said scheme and artifice and attempting so to do, cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Postal Service in violation of Title 18, United States Code, Section 1341.

7. It was further a part of said conspiracy that the defendants, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and for the purpose of executing such scheme and artifice, unlawfully, willfully and knowingly would transmit and cause to be transmitted by means of mail, wire, radio and

9a

television communications in interstate commerce, writings, signs, signals, pictures and sounds in violation of Title 18, United States Code, Section 1343.

8. It was further a part of said conspiracy that the defendants would, unlawfully, willfully and knowingly, in the offer and sale of securities, namely Select stock, by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers and holders of collateral of Select securities in violation of Title 15, United States Code, Sections 77q and 77x.

9. It was a further part of said conspiracy that the defendants would, unlawfully, willfully and knowingly, directly and indirectly, make use of means and instruments of transportation and communication in interstate commerce and of the mails to sell and would carry and cause to be carried through the mails and in interstate commerce and by means and instruments of transportation for the purpose of sale and for delivery after sale, securities, namely Select stock, at a time when no registration statement was in effect with the United States Securities and Exchange Commission, in violation of Title 15, United States Code, Sections 77e and 77x.

(Title 18, United States Code, Section 371.)

COUNTS TWO THROUGH TWENTY-EIGHT

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts Two through Twenty-eight, in the Southern District of New York,

the defendants BOVD, JOINER, GOODLOE, FORD, WEBER, TITLOW, MULLENAX, KNISELY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS, unlawfully, willfully and knowingly having devised and intending to devise a scheme and artifice to defraud the issuers of, purchasers of, and lenders against Select securities, and to obtain money and property by means of false and fraudulent pretenses, representations and promises, and for the purpose of executing said scheme and artifice and attempting so to do, did place and cause to be placed in post offices and authorized depositories for mail matter, take and receive therefrom, and did cause to be delivered by mail according to the directions thereon certain mail matter as hereinafter set forth to be sent and delivered by the Post Office Department, and did transmit and cause to be transmitted by means of wire and radio communications in interstate and foreign commerce, certain telegrams and telephone calls addressed as indicated.

2. The allegations contained in paragraphs 3(i), 3(h) and 3(j) of Count One of this Indictment are repeated and realleged as though fully set forth herein.

3. On or about the dates hereinafter set forth in Counts Two through Twenty-eight, in the Southern District of New York, and elsewhere, the defendants BOVD, JOINER, FORD, WEBER, GOODLOE, TITLOW, MULLENAX, KNISELY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS unlawfully, willfully and knowingly did place and cause to be placed in post offices and authorized depositories for mail and did cause to be delivered by mail according to the directions thereon, and did transmit and cause to be transmitted by means of wire and radio communications in interstate commerce, writings, signs, signals, pictures and sounds, between the addresses and instruments as hereinafter set forth:

11a

<u>COUNT</u>	<u>DATE</u>	<u>ADDRESSEOR</u>	<u>ADDRESSEE</u>	<u>MEANS</u>
2	Feb. 10, 1970	Weis, Voisin, Cannon, Inc., Philips, Anneal & Walden	Morris Tesser 621 Brighton Beach Ave. Brooklyn, New York	Letter
3	Feb. 11, 1970	Francine Zahl	Nevada National Registrars 360 South Sierra Street Reno, Nevada	Letter
4	Feb. 16, 1970	Karen Co.	Select Enterprises Inc. Nevada National Registrars 360 South Sierra Street Reno, Nevada	Letter
5	Feb. 16, 1970	Nevada National Registrars, Inc.	Allen Grant 333 Seventh Avenue New York, New York	Letter
6	Feb. 16, 1970	Weis, Voisin, Cannon, Inc., Philips, Anneal & Walden	Lloyd C. Hafner and Doris, JT/WROS 8 Vansiclen Drive Poughkeepsie, New York	Letter
7	Feb. 20, 1970	First Devonshire Corporation	Nevada National Registrars 360 South Sierra Street Reno, Nevada	Letter
8	Feb. 27, 1970	Nevada National Registrars, Inc.	Orvis Brothers Thirty Broad Street New York, N.Y.	Letter
9	March 9, 1970	Nevada National Registrars, Inc.	Karen & Co. Two John Street New York, N.Y.	Letter
10	March 9, 1970	Nevada National Registrars, Inc.	First Devonshire Corp. 67 Broad Street New York, N.Y.	Letter
11	March 9, 1970	Orvis Brothers & Co.	Nevada Natl. Registrars 360 So. Sierra St. Reno, Nevada	Letter
12	March 16, 1970	First Devonshire Corporation	Nevada National Registrars 360 So. Sierra St. Reno, Nevada	Letter
13	March 20, 1970	Nevada National Registrars	Orvis Brothers & Co. Thirty Broad St. New York, N.Y.	Letter
14	March 25, 1970	214-742-1569	212-759-7000	Telephone
15	March 25, 1970	214-742-1569	212-867-8181	Telephone

17a

COUNT	DATE	ADDRESS	ADDRESS	
16	March 26, 1970	Orvis Brothers & Co.	Nevada National Registrars 360 So. Sierra St. Reno, Nevada	Letter
17	March 26, 1970	214-749-9951	212-867-8181	Telephone
18	March 26, 1970	214-742-1569	212-759-7000	Telephone
19	March 28, 1970	915-683-5561	516-536-6153	Telephone
20	April 7, 1970	Nevada National Registrars, Inc.	Orvis Brothers & Co. Thirty Broad St. New York, N.Y.	Letter
21	April 8, 1970	915-684-4215	212-759-7000	Telephone 744
22	April 13, 1970	Nevada National Registrars	First Devonshire Corporation 67 Broad Street New York, N.Y.	Letter
23	April 13, 1970	214-742-1569	212-759-7000	Telephone
24	April 14, 1970	214-742-1569	212-759-7000	Telephone
25	April 27, 1970	214-742-1569	212-759-7000	Telephone
26	April 29, 1970	303-892-5922	212-349-7210	Telephone
27	May 8, 1970	205-353-0521	212-349-7210	Telephone
28	June 8, 1970	Karen Co.	Florence Glantz 750-43 72nd St. Flushing, N.Y.	Letter

(Title 18, United States Code, Sections 1341 and 1343.)

COUNTS TWENTY-NINE THROUGH FORTY

The Grand Jury further charges:

1. From on or about the 10th day of February, 1970, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, BOYD, JOINER, GOODLOE, FORD, WEBER, TITLOW, MULLENAX, KNISELY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS, the defendants, unlawfully, willfully and knowingly, in the offer and sale of securities, to wit, shares of Select, by the use of means and instruments of transportation and communications in interstate commerce and by use of the mails, directly and indirectly, (a) did employ devices, schemes and

artifices to defraud; (b) did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) did engage in transactions, practices and courses of business which would operate and did operate as a fraud and deceit upon the purchasers of said securities.

2. The allegations contained in paragraphs 3(e), 3(h) and 3(j) of Count One of this Indictment are repeated and realleged as though fully set forth herein.

3. On or about the dates hereinafter set forth in Counts Twenty-nine through Forty, in the Southern District of New York, the defendants, BOYD, JOINER, GOODLOE, FORD, MEDEA, TITLOW, MULLENAX, KNISEL, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS, unlawfully, willfully and knowingly did use and cause to be used, means and instruments of transportation and communication in interstate commerce and the mails, pursuant to and in furtherance of the scheme alleged in these Counts Twenty-nine through Forty, in connection with the following sales, pledges and dispositions of Select stock:

<u>COUNT</u>	<u>DATE</u>	<u>PURCHASER, LENDER, ETC.</u>	<u>NUMBER OF SHARES</u>
29	Feb. 10, 1970	Morris Tesser	100
30	Feb. 11, 1970	Trade Bank and Trust Co. New York, N.Y.	10,000
31	Feb. 11, 1970	Allen Grant New York, N.Y.	1,000
32	Feb. 11, 1970	Mann & Co. Medford, Mass.	3,000
33	Feb. 19, 1970	Central State Bank Brooklyn, N.Y.	8,000
34	March 5, 1970	Forsite Fund New York, N.Y.	800
35	March 9, 1970	Fort. Worth National Bank Fort. Worth, Texas	10,000

14a

<u>COUNT</u>	<u>DATE</u>	<u>PURCHASER, LENDER, ETC.</u>	<u>NUMBER OF SHARES</u>
36	April 10, 1970	American Founders Life Insurance Co. Austin, Texas	1,000
37	May 8, 1970	Essex Securities Denver, Colorado	200
38	May 8, 1970	State Nation. Bank Decatur, Alabama	20,000
39	May 9, 1970	Home State Bank McPherson, Kansas	10,000
40	July 1, 1970	Town and Country Business Trust Witchita, Kansas	10,000

(Title 15, United States Code, Sections 77q and 77x.)

COUNTS FORTY-ONE THROUGH FIFTY-ONE

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts Forty-one through Fifty-one, in the Southern District of New York, the defendants BOYD, JOINER, GOODLOE, FORD, WEBER, TITLOW, MULLENAX, KNISLEY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, VANASCO, SEGAL, BISSETT, and WELLS, unlawfully, willfully and knowingly, directly and indirectly, made use of means and instruments of transportation and communication in interstate commerce and of the mails to sell Select securities, as herein-after set forth, no registration statement as to such securities being in effect with the S.E.C.:

<u>COUNT</u>	<u>DATE</u>	<u>PURCHASER, LENDER, ETC.</u>	<u>NUMBER OF SHARES</u>
41	Feb. 10, 1970	Morris Tesser	100
42	Feb. 11, 1970	Trade Bank and Trust Co.	10,000
43	Feb. 11, 1970	Mann & Co.	3,000
44	Feb. 19, 1970	Central State Bank	8,000
45	March 5, 1970	Forsite Fund	800
46	March 9, 1970	Forth Worth National Bank	10,000
47	April 10, 1970	American Founders Life. Ins. Co.	1,000

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<u>COUNT</u>	<u>DATE</u>	<u>PURCHASER, LENDER, ETC.</u>	<u>NUMBER OF SHARES</u>
48	May 8, 1970	Essex Securities	200
49	May 8, 1970	State National Bank	20,000
50	May 9, 1970	Home State Bank	10,000
51	July 1, 1970	Town and Country Business Trust	10,000

(Title 15, United States Code, Sections 77e and 77x.)

COUNTS FIFTY-TWO AND FIFTY-THREE

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts Fifty-two and Fifty-three, in the Southern District of New York, the defendants BOYD, JOINER, GOODLOE, FORD, WEBER, TITLOW, MULLENAX, KNISELY, BROOKSHIRE, BARNETT, RAPPAPORT, SCHLEGER, ~~WILSON~~, SEGAL, BISSETT and WELLS, did, in a matter within the jurisdiction of a department and agency of the United States, to wit, the S.E.C., unlawfully, willfully and knowingly, make false, fictitious and fraudulent statements and representations and did make and use false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries hereinafter specified in Counts 52 and 53, in toto and in, at least, the following particulars, to wit: (1) back-dating (2) unauthorized signatures; (3) non-existent exhibits and attachments; (4) unauthorized warranties and representations as to third persons; and (5) misdescriptions of the value of Select shares.

<u>COUNT</u>	<u>DATE</u>	<u>DOCUMENT</u>
52	February 26, 1970	"Dx (Schneiderman) 2 for id."
53	February 26, 1970	"Div. Ex. Azzarone 3"

(Title 18, United States Code, Section 1001.)

\_\_\_\_\_  
FOREMAN

PAUL J. CURREN  
United States Attorney

1 jbs

2 UNITED STATES OF AMERICA

3 vs.

4 JOE TRUMAN BOYD, et al.

5 -----

6 New York, October 17, 1975;  
7 9.05 o'clock a. m.

8 (Trial resumed.)

9 --

10 (Jury present.)

11 THE COURT: This stipulation is marked Court's  
12 Exhibit 54 and the papers are admitted accordingly.13 THE CLERK: The Court is about to charge the  
14 jury. Any spectator wishing to leave the courtroom will  
15 do so now or remain seated until the completion of the  
16 charge.17 CHARGE OF THE COURT18 THE COURT: Ladies and gentlemen, we have  
19 reached the concluding phase of the trial. The case  
20 will shortly be placed in your hands for your verdict.  
21 I want to express to you the Court's appreciation and  
22 thanks for your attentiveness, your patience during the  
23 trial and your promptness in this case as befits the  
24 triers of the facts in a case of the importance of this  
25 one to the parties and in any case before the United States

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2       Courts.

3                   I shall now give you your final instructions,  
4       which will guide your deliberations. Briefly, as you  
5       have been told, the defendants on trial have been charged  
6       by the Government with criminal offenses. It is your  
7       recollection of the facts that counts here and not the  
8       recollection of the counsel and not my recollection. It  
9       is for you determine the weight that will be given to the  
10      evidence, the credibility that you will extend to the  
11      witnesses who testified and the reasonable inferences that  
12      are to be drawn from the evidence that has been received.

13                   You have heard the summations of counsel.

14                   If your recollection differs from that of counsel or from  
15       my recollection, if I should refer to any evidence, your  
16       recollection and the judgment of the facts that you make  
17       controls.

18                   You must approach your duty with an attitude of  
19       complete fairness and impartiality, one in which you reach  
20       your decision solely on the evidence on the trial and with-  
21       out the slightest trace of sympathy, prejudice or bias for  
22       or against any defendant or the Government.

23                   The fact that the Government is a party here  
24       entitles it to no greater or no less consideration than  
25       that accorded to any party in a court of the United States.

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2       All parties are equals at this bar of justice.

3               It is my province to instruct you as to legal  
4       principles that are to be followed in the case and it is  
5       your duty to accept those instructions as they are given to  
6       you by me.    On the other hand, it is your exclusive  
7       function to determine the facts on the basis of your  
8       consideration of the evidence and then, applying the  
9       instructions as to the law that I am about to give to you,  
10      to decide whether or not the defendant on trial before you  
11      is guilty of the charges against that defendant or not  
12      guilty.

13               You are the sole and exclusive judges of the  
14      facts.    Your decision as to the fact is final and con-  
15      clusive.

16               During the trial I have been called upon to  
17      make rulings on various questions, such as when a question  
18      put to a witness was objected to or after a question was  
19      put and was answered, a motion was made to strike out the  
20      answer.    I have sustained some objections and I have  
21      overruled others.    I have struck out answers and exhibits  
22      that were offered.    It is essential in the performance  
23      of your duty that when anything was ordered stricken from  
24      the record you put it out of your mind and disregard it.  
25      Similarly, if a question was asked and an objection to that

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2       question was sustained and no answer was given, the question  
3       itself should play no part in your consideration of the  
4       case.

5               No inferences as to guilt or innocence of any  
6       defendant on trial or as to the credibility of any witness  
7       should be drawn from any rulings that I have made or from  
8       the fact that upon occasion I have asked questions of  
9       certain witnesses. My questions were intended only for  
10      clarification, to expedite matters. They were not  
11      intended to suggest any opinions as to guilt or innocence  
12      of any defendant or as to the credibility of anyone who  
13      appeared before you. It is neither my intention nor my  
14      function to favor one side or the other or to imply that  
15      I have any views as to the credibility of any of the  
16      witnesses or as to the guilt or innocence of any of the  
17      defendants. That is your sole and exclusive function.

18               Counsel, you must remember, not only have the  
19      right but, indeed, it is their duty to thoroughly investigate  
20      their case and interview prospective witnesses and to  
21      press whatever legal objections they believe should be  
22      asserted and to seek to bar evidence or proposed evidence  
23      on legal grounds where that is appropriate. In doing so,  
24      each lawyer is simply performing his sworn duty as a lawyer  
25      for a client and on behalf of his client.

2 As I have indicated earlier, the indictment here  
3 is but a formal method of accusing a defendant of a crime  
4 and bringing the case into court for trial and determin-  
5 ation. It is not any evidence that a crime has been com-  
6 mitted and no inference of any kind may be drawn from the  
7 fact of the indictment. The grand jury which returned the  
8 indictment was not asked to find out if the defendant was  
9 guilty or not guilty. That is solely your function.

10 There are two indictments in this case. They  
11 have been consolidated for trial. The indictments together  
12 name 17 defendants in all. Three defendants, Messrs.  
13 Segal, Wells and Joiner, have pleaded guilty. One  
14 defendant, Weber, took sick during the trial and is hospital-  
15 ized and his case had been severed from this trial. One  
16 other named defendant was not called to this trial before  
17 you. Accordingly, there are only 12 defendants before  
18 you now.

19 No inference may be drawn against any defendant  
20 on trial because others named in the indictment pleaded  
21 guilty. The fact that three pleaded guilty is no  
22 evidence against those on trial and may not be considered  
23 in any way in determining the facts as to those who are  
24 before you. The 12 are the only persons as to whom you  
25 are called upon to render a verdict of guilty or not guilty

2 and, as I will explain to you shortly, in considering it,  
3 you may have to determine the nature of the participation,  
4 if any, of other defendants and alleged co-conspirators.

5 The indictment contains 53 counts against all of  
6 the defendants. Each count of the indictment charges a  
7 separate crime against each individual defendant. Each  
8 offense and the evidence applicable thereto should be con-  
9 sidered separately from the other counts and within that  
10 count the evidence should be considered separately as to  
11 each of the named defendants. The fact that you may find  
12 all or some of the accused guilty or not guilty on any  
13 particular count should not influence your verdict with  
14 respect to any other defendant or with respect to any other  
15 count.

16 Each defendant before you has pleaded not guilty.  
17 That means that the Government has the burden of proving  
18 guilt beyond a reasonable doubt with respect to each crime  
19 that each defendant is accused of having committed. That  
20 burden never shifts. A defendant is under no obligation  
21 to undertake to prove his innocence. Indeed, a defendant  
22 does not have to submit any evidence at all. On the  
23 contrary, under our law a defendant is presumed to be  
24 innocent of any charge laid against him in the indictment.  
25 That presumption existed when the indictment was handed down

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2 and the fact that a defendant did not take the stand under  
3 the law creates no inferences against him. A defendant's  
4 presumption of innocence remains throughout the trial and  
5 in your deliberations. It is a presumption which is  
6 sufficient in itself to require an acquittal of a defendant  
7 unless you, the jury on all the evidence are convinced of  
8 his guilt beyond a reasonable doubt.

2 9 A reasonable doubt is one that arises out of the  
10 evidence in the case or the lack of evidence. It is a  
11 doubt which is substantial and not merely shadowy.  
12 A reasonable doubt is one that appeals to your reason, to  
13 your judgment, to your common sense and to your experience.  
14 It is not an excuse to avoid performance of an unpleasant  
15 duty. A reasonable doubt is such as would cause prudent  
16 people to hesitate before acting in matters of importance  
17 to themselves. Putting that a little differently, if you  
18 are confronted, as indeed you are here, with an important  
19 decision and, after reviewing all the factors that are  
20 pertinent to that decision, you find yourself beset by  
21 uncertainty and unsure of your judgment, then you have a  
22 reasonable doubt. Conversely, in that same situation  
23 if you have taken into account all the elements that pertain  
24 to the problem and you find you have no uncertainty and no  
25 reservation about your judgment, then you have no reasonable

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2       doubt.

3                   Proof beyond a reasonable doubt does not mean  
4       proof to a positive certainty or proof beyond all possible  
5       doubt. If that were the rule, few persons, however guilty,  
6       could ever be convicted. It is practically impossible  
7       for a person to be absolutely and completely convinced of  
8       any fact which, by its nature, is not susceptible of  
9       mathematical certainty. So, that kind of certainty, as  
10      I have tried to indicate, is not the test. You are going  
11      to have to rely on your own common sense and general  
12      experience in evaluating the evidence.

13                There are, generally speaking, two types of  
14       evidence from which a jury may properly find the truth in  
15       the facts of the case. One is direct evidence, such as  
16       the testimony of an eyewitness or a participant. The other  
17       is indirect or circumstantial evidence, the proof of a  
18       chain of circumstances pointing to the existence or non-  
19       existence of certain facts. In order to prove a fact by  
20       circumstantial evidence, there must be positive proof of  
21       some fact which, though true, does not itself directly  
22       establish the fact in dispute but does afford basis for a  
23       reasonable inference of its existence. The fact or  
24       facts upon which it is sought to base an inference must  
25       be shown and not left to rest in conjecture and when shown

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2       it must appear that the inference drawn is the only one  
3       that can fairly and reasonably be drawn from the facts and  
4       that any other explanation is fairly and reasonably  
5       excluded.

6               A common example given to juries of circum-  
7       stantial evidence, in explanation of what I have just said,  
8       is the following:

9               Suppose at the time that you came into court  
10      this morning, the sun was shining and there were no clouds  
11      in the sky and when you came into this trial courtroom  
12      the shades were drawn and the blinds were down so that you  
13      couldn't see outside and, then, pretty soon somebody came  
14      through that door, walking into the courtroom with a  
15      dripping umbrella and a dripping raincoat. You haven't  
16      been outside in the meantime. When you left outside, it  
17      was clear but when these people came in with their dripping  
18      umbrellas and raincoats, something may have happened outside.  
19      You would be entitled to infer from the circumstances that  
20      there is a dripping umbrella and a raincoat that it is  
21      raining outside. Thus, circumstantially you would infer  
22      from a fact, the dripping raincoat and umbrella, some other  
23      matter -- the rain outside. The mind is led circum-  
24      stantially from a fact to reach another fact. That will  
25      give you an illustration of what circumstantial evidence is

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2       and what it might lead to.

3               It is not necessary that the participation  
4       or lack of participation of a defendant in any crime be  
5       shown by direct evidence.    The connection may be inferred  
6       from such facts and circumstances as legitimately tend to  
7       sustain that inference.

8               In this case, of course, each side has produced  
9       both direct and indirect or circumstantial evidence.

10          The Government contends that its evidence establishes each  
11       defendant's guilt.    Each defendant contends that no  
12       evidence has overcome the presumption of his innocence and  
13       that, at least, there is a reasonable doubt of his guilt.  
14       You apply to all the evidence the same standard of proof.  
15       It must satisfy you of the guilt of the defendant beyond a  
16       reasonable doubt or else you must acquit that defendant.

17          In evaluating the evidence which has been  
18       placed before you, you will determine the reliability of  
19       the witnesses you have heard and the extent to which you  
20       can count on any or all of them for accurate accounts of  
21       the facts.    You have had an opportunity to observe the  
22       witnesses as they have testified.    You want to be asking  
23       yourselves and thinking, together, how each witness  
24       impressed you.    Did the witness appear to be truthful,  
25       candid, frank, forthright, or did the witness seem to be

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2                   evasive or shifty or suspect in any other way.   Did the  
3                   witness appear to know what he was talking about and did  
4                   he impress you as having a purpose to report his knowledge  
5                   to you truthfully and accurately.   Was he consistent or  
6                   self-contradictory.   How did the manner and matter of his  
7                   direct testimony compare with his manner and matter of  
8                   testimony tested on the cross-examination.

9                   You should consider not only the intrinsic  
10                  persuasiveness of each person's testimony by itself but its  
11                  setting in the circumstances of the whole case -- for  
12                  example, the degree to which any particular item of testimony  
13                  is corroborated or contradicted by other evidence in the  
14                  case -- and all such things you will test by your own  
15                  mature judgment about life, about people, about human  
16                  behavior.

17                  A witness may be discredited or, as we say,  
18                  impeached by contradictory evidence or by evidence that at  
19                  other times he made statements inconsistent with his testi-  
20                  mony here on the witness stand.

21                  You should consider, among other things, the  
22                  question of interest or motive.   The witnesses have  
23                  identified their backgrounds and associations.   You may  
24                  wish to consider whether the witness may have had induce-  
25                  ments or incentives or motives to shade the truth or has

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2 biases of one kind or another that may have led the  
3 witness, consciously or not, to give you less than a com-  
4 pletely accurate account of the facts he purported to  
5 portray.

6 If you believe a witness has wilfully sworn  
7 falsely before you, you are free to disregard all his testi-  
8 mony or to accept and credit such parts of it as your judg-  
9 ment dictates should be accepted.

10 The testimony of an informer and that of an  
11 accomplice who provides evidence against a defendant on  
12 trial must be examined and weighed by the jury with greater  
13 care and caution than the testimony of an ordinary witness.  
14 The fact that these witnesses have pleaded guilty or that  
15 they may have motives for testifying falsely does not  
16 necessarily show that they were testifying falsely. The  
17 unsupported testimony of an accomplice, if credited by  
18 the jury, is sufficient on which to convict a defendant on  
19 trial when the Government has sustained its burden of  
20 proof.

21 Prior conviction of a felony does not render a  
22 witness incompetent to testify but is merely a circumstance  
23 which you may consider in determining the credibility  
24 of the witness.

25 A defendant on trial who has testified is to

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2       have his testimony judged in the same way as that of any  
3       other witness.    A defendant who testifies has a deep  
4       personal interest in the outcome.    However, it by no means  
5       follows that simply because a defendant has a vital interest  
6       in the end result he is not capable of telling a truthful,  
7       candid version of the facts.    It will be for you to make  
8       the judgment of his credibility under all the facts and  
9       circumstances in evidence.

10       The statements of a witness given under oath  
11       before trial in a hearing or proceeding or in a deposition  
12       subject to the penalty of perjury, which statements are  
13       inconsistent with the witness' trial testimony, are to be  
14       considered as evidence of the truth of the matter asserted,  
15       which the jury may consider with all the other evidence in  
16       the case.    However, if the prior inconsistent statement  
17       was not under oath, it may be considered only for impeach-  
18       ment of the truth of the trial testimony.

19       If the testimony of a declarant was given  
20       before the Securities and Exchange Commission -- a  
21       declarant is a person who speaks, declares something --  
22       and that testimony was given under oath under penalty of  
23       perjury and in it reference is made to others than the  
24       declarant, it may only be considered as against such others  
25       if you should find that there was a conspiracy, that the

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2517

2 party named in such testimony has, by independent evidence,  
3 been shown to be a member of the conspiracy and the statement  
4 concerning him was made in the course and in furtherance of  
5 the conspiracy and its objectives.

6 There has been testimony here to the previous  
7 good character of the defendant Bissett and Barnett, their  
8 reputation for truth and honesty. You should consider such  
9 evidence of good character together with all the other  
10 evidence in the case in determining the guilt or innocence  
11 of the defendant. Evidence of good character, if you  
12 believe it, may in itself create a reasonable doubt where,  
13 without such evidence, no such reasonable doubt would have  
14 existed but, if upon all the evidence you are satisfied  
15 beyond a reasonable doubt that the defendant is guilty, a  
16 showing that he previously enjoyed a reputation of good  
17 character does not justify or excuse the offense and you  
18 should not acquit a defendant merely because you believe he  
19 is a person of good repute in the community in which he moves.

20 The testimony of a character witness is not to  
21 be regarded by you as expressing the witness' personal  
22 opinion of the defendant's character. It is only a  
23 reflection of a reputation in the community. Testimony of  
24 character reputation is not to be taken by you as the witness  
25 opinion as to the guilt or innocence of the defendant. The

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2518

2       guilt or innocence of the defendant is for you and you  
3       alone to determine. Consequently, you may consider  
4       whether those with whom the defendant came in contact  
5       previously were not informed or may have been misled and  
6       that the defendant did not reveal to them matters bearing  
7       on his character. This is a matter for you to determine  
8       from all of the evidence.

9               The 53 counts of the indictments fall into two  
10      major classes. Count 1 charges a conspiracy. The  
11      remaining 52 counts, which I shall call the substantive  
12      counts, charge all the defendants with separate violations  
13      of the particular United States statutes specified in  
14      Count 1.

15               You may request copies of the indictments and  
16      may have them with you after the case has been submitted  
17      to you.

18               Count 1, the conspiracy count, charges that  
19      between October 1, 1959 and February 10, 1975, when the  
20      indictment was returned, all the defendants and co-  
21      conspirators conspired to violate the federal mail and wire  
22      fraud statutes, the Securities Act of 1933, and the law  
23      which prohibits false statements to federal agencies, such  
24      as the Securities and Exchange Commission.

25               The indictments charge that the object of the

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2519

2       conspiracy was to obtain control of a shell corporation,  
3       here Select Enterprises, Inc., without any substantial  
4       assets, to inflate artificially its price and to sell,  
5       pledge and distribute the corporation's shares at enormous  
6       profits to members of the public without providing material  
7       information required to be furnished by law.

8               As a practical matter, it is impossible for the  
9       average investor to differentiate between securities of  
10       little or no value, those of high speculative nature and  
11       those offering at least reasonable prospects of a satis-  
12       factory return on the investment.     He cannot, himself,  
13       make such distinctions because he is unable to make a  
14       personal investigation of the operations and financial  
15       condition of the company issuing the stock.    He must,  
16       therefore, rely upon available oral and written information  
17       about the company, its financial condition, its assets, its  
18       management, its operations, its products, its resources,  
19       its prospects and the terms and conditions with respect to  
20       its securities.

21               The Securities Act of 1933 which Congress  
22       enacted in recognition of these facts and of the further  
23       fact that sales of securities often involve the use of the  
24       mails and other interstate facilities -- as, for example,  
25       a telephone -- proceeds on a philosophy of full and fair

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2       disclosure of all material facts to prospective purchasers  
3       of securities.4               It does this so that the public will have  
5       access to information necessary to make a truthful, real-  
6       istic appraisal of the merits of the securities offered  
7       for sale and thus exercise an informed judgment in deciding  
8       whether to buy them.9               The Securities Act accomplishes this objective  
10      in two ways that are directly relevant to the indictments  
11      here:12               By Section 17, which the indictments refer to  
13      as Title 15, United States Code, Section 77-Q, it prohibits  
14      schemes to defraud, untrue statements and fraudulent  
15      practices in the interstate sale of securities.16               By Section 5, which the indictments refer to  
17      as Title 15 of the United States Code, Section 77-E, it  
18      requires that before any security is offered to the public,  
19      the corporation issuing the security must file with the  
20      SEC -- Securities and Exchange Commission -- a registra-  
21      tion statement making a full and accurate disclosure of  
22      material facts relating to the company's properties, its  
23      business operations, its management, its principal stock-  
24      holders, its financial condition, supported by certified  
25      balance sheets and profit and loss statements and the

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2 amount and types of stock outstanding.

11 I have spoken of the conspiracy charged in  
12 Count 1. What is a conspiracy? It is a combination or  
13 agreement of two or more persons or concerted action by  
14 two or more persons to accomplish a criminal or unlawful  
15 purpose -- in essence, a partnership in crime.

16                   A conspiracy presents a greater potential  
17                   threat to the Government and to society than the lone wrong-  
18                   doer. That is why it is a separate crime. Concerted  
19                   action for criminal purposes often, if not normally, makes  
20                   possible the attainment of ends more complex than those  
21                   which the individual acting alone could accomplish.  
22                   Moreover, group association increases the likelihood that  
23                   the criminal object will be successfully realized and  
24                   renders detection more difficult than in the instance of  
25                   the sole wrong doer.

2 It is because of these and other reasons that  
3 Congress made a conspiracy or a concerted action to  
4 violate a federal law a crime entirely separate, distinct  
5 and different from the actual violation of the substantive  
6 law which may be the object of the conspiracy.

7 The gist of the crime is the unlawful combin-  
8 ation or agreement or scheme to violate the law. The  
9 success or lack of success of the plot or agreement or  
10 scheme does not matter. As I have already told you, a  
11 conspiracy is a crime entirely distinct and separate from  
12 the substantive crime itself.

13 In order to prove the crimes alleged in Count 1,  
14 the conspiracy count, the Government must establish the  
15 following elements beyond a reasonable doubt:

16 First, existence of the conspiracy charged in  
17 the indictments;

18 Second, that it was part of the conspiracy  
19 unlawfully to violate the provisions of one or more of the  
20 statutes specified in Count 1;

21 Third, that the defendant you are considering  
22 knowingly and wilfully became a participant in the con-  
23 spiracy; and,

24 Fourth, that at least one of the co-conspirators  
25 knowingly committed at least one of the overt acts set forth

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2                   in the indictments in the Southern District of New York  
3                   during the period of its existence.

4                   If the Government fails to establish each of  
5                   these elements beyond a reasonable doubt, you must acquit  
6                   the defendant under consideration. If, on the other  
7                   hand, it has established each element beyond a reasonable  
8                   doubt, you must find that defendant guilty.

9                   It is not necessary that a conspiracy be  
10                  established by direct evidence in order to convict. In  
11                  fact, it can rarely be proved in that fashion for the  
12                  reason that people seldom sit down and sign agreements to  
13                  engage in an unlawful scheme or activity, much less to  
14                  have them notarized or made known to the public. That  
15                  type of conduct would be extraordinary. It is sufficient  
16                  if two or more persons in any manner impliedly or tacitly  
17                  come to a common understanding to violate the law. It is  
18                  not necessary that the persons charged enter into a formal  
19                  agreement or that they state all the details of their  
20                  agreement or scheme or how it is to be effectuated.

21                  Conspiracy is generally a matter of inference  
22                  to be drawn from the conduct of the persons charged.  
23                  Actions may often speak louder than words and a defendant's  
24                  participation in a conspiracy may be inferred from such  
25                  facts and circumstances in evidence as appear to you

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2       logically to support or sustain such an inference.

3       It is sufficient that it be shown beyond a reasonable doubt  
4       that the defendant and the co-conspirator came to a mutual  
5       understanding to accomplish an unlawful act.

6       (Continued on next page.)

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2 To determine whether a conspiracy existed,  
3 you piece together the independent evidence relating to  
4 each alleged conspirator and determine, looking at the  
5 whole picture, whether the acts, conduct and statements,  
6 establish to your satisfaction beyond a reasonable doubt  
7 that there was a conspiracy.

8 If, for example, there was concerted action  
9 among several persons, with each of them doing something  
10 related to the acts of others, all of which contributed  
11 in the same or similar manner toward the accomplishment of  
12 some unlawful objective, such evidence would support  
13 the inference that those persons had conspired together  
14 to accomplish that unlawful purpose.

15 An unlawful agreement may exist even though  
16 the individual conspirators may have done some acts  
17 in furtherance of a common unlawful purpose apart from,  
18 and unknown, to the others.

19 If you do conclude that a conspiracy as  
20 charged did exist, you must next find that what the  
21 conspirators intended to do would have violated one or  
22 more of the following statutory provisions:

23 The first provision states that: "Whoever,  
24 having devised or intending to devise any scheme or  
25 artifice to defraud or for obtaining money or property

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2 by means of false or fraudulent pretenses, representation  
3 or promises for the purpose of executing such scheme  
4 or artifice or attempting so to do, places in any post  
5 office or authorized depository for mail matter, any  
6 matter or thing whatever to be sent or delivered by the  
7 Postal Service or knowingly causes to be delivered by  
8 mail according to the directions thereon, any such matter  
9 or thing" shall be guilty of a crime.

10 The second of the provisions states: "Whoever,  
11 having devised or intending to devise any scheme or  
12 artifice to defraud, or for obtaining money or property  
13 by means of false or fraudulent pretenses, representations,  
14 or promises, transmits or causes to be transmitted by  
15 means of wire communication in interstate commerce,  
16 any writings or sounds for the purpose of executing  
17 such scheme or artifice shall be" guilty of a crime.

18 The third of the laws stated in the indictment  
19 as an objective of the conspiracy, Section 17(a) of the  
20 Securities Act of 1933 states that: "It shall be  
21 unlawful for any person in the offer or sale of any  
22 securities by the use of any means or instruments of  
23 transportation or communication in interstate commerce  
24 or by use of the mails, directly or indirectly, to  
25 employ any device, scheme, or artifice to defraud,

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2       or to obtain money or property by means of any untrue  
3       statement of a material fact or any omission to state  
4       a material fact necessary in order to make the statements  
5       made, in the light of the circumstances under which  
6       they were made, not misleading, or to engage in any  
7       transaction, practice, or course of business which  
8       operates or would operate as a fraud or deceit upon the  
9       purchaser."

10       Any person who wilfully violates this  
11       provision is guilty of a crime under Title 15, United  
12       States Code, Section 77q.

13       The fourth provision, Section 5(a) of the  
14       Securities Act of 1933 states that: "Unless a  
15       registration statement is in effect as to a security,  
16       it shall be unlawful for any person, directly or  
17       indirectly, to make use of any means or instruments of  
18       transportation or communication in interstate commerce  
19       or of the mails to sell such security through the use or  
20       medium of any prospectus or otherwise; or to carry or  
21       cause to be carried through the mails or in interstate  
22       commerce, by any means or instruments of transportation,  
23       any such security for the purpose of sale or delivery  
24       after sale."

25       Any person who wilfully violates this

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2 provision is guilty of a crime under Title 15, United  
3 States Code, Section . . .

4 The last, or fifth provision, states that:

5 "Whoever, in any matter within the jurisdiction of any  
6 department or agency of the United States knowingly and  
7 wilfully falsifies, conceals or covers up by any trick,  
8 scheme, or device a material fact, or makes any false,  
9 fictitious or fraudulent statements or representations,  
10 or makes or uses any false writing or document knowing  
11 the same to contain any false, fictitious or fraudulent  
12 statement or entry" shall be guilty of a crime T. 18, Section  
1001, U.S. Code.

13 If you conclude that a conspiracy as charged  
14 did exist, you must next determine whether the defendant  
15 you are considering was a member, that is, whether he  
16 participated in the conspiracy wilfully, with specific  
17 criminal intent, with knowledge of its unlawful purposes  
18 and in furtherance of its unlawful objectives. An act  
19 or a failure to act is knowingly done if done voluntarily  
20 and intentionally and not because of mistake or  
21 accident or other innocent reason. An act or a failure  
22 to act is wilfully done if done voluntarily and  
23 intentionally and with bad purpose either to "sobey or  
24 disregard the law.

25 It is important to remember that in deciding

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2 he became a member. Nor is it required that he knew  
3 all the members of the conspiracy.

4 It is not necessary that the defendant be  
5 fully informed as to the details of the scope of the  
6 conspiracy in order to justify an inference of knowledge  
7 on his part. Omniscience regarding every aspect of the  
8 conspiracy is not indispensable to a finding of knowledge  
9 of the illicit purposes and the nature of the operation  
10 of the conspiracy. Legitimate and reasonable inferences  
11 of such knowledge can be drawn from circumstantial as  
12 well as direct evidence, and as I have explained, it is  
13 immaterial whether the defendant knew the full extent  
14 of the conspiracy and all of its activities and actors.

15 In determining whether the defendant was a  
16 member of the conspiracy, you must determine whether he  
17 participated with knowledge of its unlawful purpose.  
18 Knowledge is a matter of inference from the facts proved.  
19 As I said, it is not necessary that one be fully  
20 informed as to the details and scope of the conspiracy,  
21 or be acquainted with all of the conspirators, in order  
22 to justify an inference of knowledge. The question then  
23 is: Did he join the others with awareness of at least  
24 some of the basic purposes and aims of the conspiracy?  
25 If so, then he adopts as his own the past and future acts

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2 of all the other conspirators.

3 The guilt of a conspirator is not measured by  
4 the extent or the duration of his participation. Even if  
5 he entered into the conspiracy after it was formed, or if  
6 he participated in it to a degree more limited than that  
7 of his co-conspirators, he is equally culpable so long as  
8 he was in fact a conspirator.

9 I want to caution you that mere presence or  
10 association with one or more conspirators does not make  
11 one a member of a conspiracy. Nor is knowledge of a  
12 conspiracy without participation therein sufficient to  
13 constitute membership. What is necessary is that the  
14 defendant participate with knowledge of at least some  
15 of the purposes of the conspiracy and with intent to aid  
16 in the accomplishment of those unlawful ends.

17 In short, a person becomes a member of a  
18 conspiracy by associating himself, even though informally,  
19 with a common plan or scheme, knowing the central aim  
20 or purpose, and intending to aid in bringing about the  
21 success of the plan or scheme.

22 If you find circumstances of intrigue or  
23 deviousness or attempts by the defendants to conceal the  
24 true nature of a transaction, this may be considered as  
25 circumstantial evidence of knowledge of unlawful purpose.

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2 So, too, any attempt to conceal or fabricate evidence may  
3 be considered by you as showing such knowledge.

4 Proof of several separate conspiracies is not  
5 proof of the single, overall conspiracy charged in the  
6 indictment unless one of the several conspiracies which  
7 is proved is the single conspiracy which the indictment  
8 charges. What you must do is determine whether the  
9 conspiracy charged in the indictment existed between two  
10 or more conspirators. If you find that no such conspiracy  
11 existed, then you must acquit. However, if you are  
12 satisfied that such a conspiracy existed, you must  
13 determine who were the members of that conspiracy.

14 If you find that a particular defendant is a  
15 member of another conspiracy, not the one charged in the  
16 indictment, then you must acquit the defendant. In other  
17 words, to find a defendant guilty you must find that he  
18 was a member of the conspiracy charged in the indictment  
19 and not some other conspiracy.

20 An agreement to accomplish an unlawful object  
21 does not cease to be a single conspiracy because it  
22 continues over a period of time or because there exists  
23 a time gap in the proof or a change in the membership.

24 The agreement may continue for a long period  
25 of time and include the performance of many transactions.

2 New parties may join the agreement at any time while  
3 others may terminate their relationship. The fact that  
4 the parties are not always identical or were not in  
5 direct contact does not mean that there are separate  
6 conspiracies. While the conspiracy may have a small group  
7 of core conspirators, other parties who knowingly  
8 participate with these core conspirators and others to  
9 achieve a common goal may be members of an overall  
10 conspiracy.

11 In essence, the question is, what is the nature  
12 of the agreement? That is for you to determine after  
13 examining all the evidence.

14 If you find the government has sustained the  
15 element as to a defendant's participation, we reach the  
16 final element. I have already mentioned that the fourth  
17 essential element of the crime of conspiracy is that an  
18 overt act intended to effect the object of the  
19 conspiracy be committed by at least one of the  
20 co-conspirators after the unlawful agreement has been made.

21 An overt act is a step, action or conduct  
22 which is taken to achieve, accomplish or further the  
23 objective of the conspiracy. The purpose of requiring  
24 proof of an overt act is that while parties might conspire  
25 and agree to violate the law, yet they may change their

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2 minds and do nothing to carry it into effect, in which  
3 event it will not constitute an offense. The overt act  
4 to further the objective of the conspiracy can be a  
5 perfectly lawful act. It need be neither a criminal act  
6 nor the very crime which is the object of the conspiracy.  
7 It is any act or step in the carrying out of the plan.

8 It is not necessary for the government to prove  
9 that each member of the conspiracy committed or  
10 participated in one particular overt act, since the act  
11 of any one conspirator done in furtherance of the  
12 conspiracy becomes the act of all the other members.

13 Thus, the government is not required to prove  
14 all of the overt acts as alleged in the indictment.  
15 It is sufficient if it proves the commission by any  
16 co-conspirator of at least any one of the acts in the  
17 Southern District of New York in furtherance of the  
18 objectives of the conspiracy within the period of the  
19 existence of the conspiracy.

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20 I will now call to your attention the overt  
21 acts that have been set forth. When you get the indictment  
22 you will be able to read them again for yourselves.

23 The indictment charges as overt acts in  
24 furtherance of the said conspiracy and to effect the  
25 objects thereof the defendants and their co-conspirators

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2 committed the following overt acts among others in the  
3 Southern District of New York and elsewhere:

4 (1) In or about January 26, 1970, the  
5 defendant Boyd carried from Reno, Nevada, to New York,  
6 New York, 1,036,603 shares of Select stock, delivered  
7 100,000 shares to the defendant Segal in nominee names,  
8 and then locked the balance into a safe deposit box  
9 under their control. The safe deposit box was locked  
10 by two different locks. Boyd and Segal each had one  
11 separate key and the box could not be opened without  
12 both keys.

13 This particular overt act, before I go any  
14 further, illustrates what I said before. All of the  
15 things that I have just read to you could be considered  
16 perfectly lawful acts, but if they were part of a scheme  
17 to carry out a conspiracy and in furtherance of that  
18 scheme and conspiracy, then they become overt acts to  
19 show that the conspiracy is in operation.

20 The second overt act charged:

21 (2) On or about February 4, 1970, co-conspirator  
22 Azzarone filed an application form with the National  
23 Quotation Bureau (pink sheets) for the purpose of  
24 publishing artificial prices for Select stock.

25 (3) On or about February 11, 1970, the

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2 defendant Segal delivered 3,000 shares of Select stock  
3 to the president of Mann & Company.

4 (4) On or about February 26, 1970, the defendants  
5 Rappaport, Segal, and Schleger, together with  
6 co-conspirator Sherman, prepared, backdated, and delivered  
7 documents, purporting to be contracts evidencing true  
8 business activities of Select to the SEC through  
9 co-conspirator Azzarone and others.

10 (5) On or about March 1, 1970, the defendant  
11 Segal flew to Texas to obtain the signatures of the  
12 defendant Knisely on the aforementioned backdated contracts.

13 (6) On or about March 9, 1970, the defendants  
14 Boyd and Weber delivered signed copies of the aforementioned  
15 backdated contracts to the SEC at which time Boyd made  
16 perjurious statements as to such false documents.

17 (7) On or about March 28, 1970, the defendants  
18 Boyd, Ford, Barnett, and Knisely fraudulently prepared,  
19 issued, and caused the issuance of false and misleading  
20 certified financial reports to shareholders of Select  
21 and the trading public.

22 (8) On or about April 17, 1970, after the  
23 termination of the SEC suspension of trading in Select  
24 stock and for the purpose of promoting continued  
25 distribution and trading in such stock on behalf of all

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2 defendants, the defendants Boyd and Ford supplied false  
3 and fraudulent information to the SEC.

4 (9) In or about the week ending May 9, 1970,  
5 the defendant Wells provided false and misleading  
6 information as to the Select trading market to purchases,  
7 banks, pledgees, and other lenders as well as to the SEC.

8 And then, finally, each of the mailings,  
9 telephone and telegraph usages alleged in counts 2 through  
10 28 of this indictment are repeated and realleged herein  
11 as overt acts.

12 Since I will have given you a copy of the  
13 indictment which sets forth each of the mailings, telephone  
14 and telegraph usages in counts 2 to 28, I will hereby  
15 incorporate into this charge by reference as if fully set  
16 forth now, in order to save the necessity of reading  
17 each one of them at this time. You will have the  
18 opportunity in the jury room to read them. I will give  
19 you two examples which will show you what it is that I am  
20 referring to.

21 Count 2, under date of February 10, 1970 refers  
22 to a letter which came from Weis, Voisin, Cannon, Inc.,  
23 Philips, Appel & Walden and was addressed to Morris Tesser,  
24 621 Brighton Beach Avenue, Brooklyn, New York. I believe  
25 we had Mr. Tesser here before you, and that letter is

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2 alleged to be a step in the carrying out of the  
3 conspiracy and, therefore, an overt act.

4 Now we take another one, count 8, for example,  
5 a letter dated February 27, 1970, written by Nevada  
6 National Registrars, Inc. to Orvis Brothers at 30 Broad  
7 Street, New York, New York. That letter is one of the  
8 exhibits in evidence and is claimed to have been a step  
9 in furtherance of the objectives and in the course of the  
10 alleged conspiracy.

11 Suppose I just pause to give you an opportunity  
12 to relax in your place before I go on with the remaining  
13 counts. I have completed my discussion of the conspiracy  
14 count, and I will take up the remaining counts in just  
15 a moment. You may relax.

16 (Pause)

17 I now take up the substantive counts.

18 Counts 2 to 28 are the counts that contain the  
19 references to letters, and telephone messages, they  
20 are the mail and wire fraud counts. For some reason  
21 unknown to me we refer to the telephone as a wire  
22 communication. We know we have satellites without wires  
23 these days, but that's a wire communication.

24 To establish that the defendants are guilty  
25 of the crime of mail and wire fraud as charged in counts 2

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2 to 28, the government must prove beyond a reasonable  
3 doubt as to the count you are considering each of the  
4 following elements:

5 1. That on or about the dates alleged in the  
6 indictment the defendant under consideration devised or  
7 intended to devise a scheme or artifice to defraud or to  
8 obtain money by fraudulent pretenses or representations.

9 2. That he did devise or became a party to  
10 such a scheme or artifice knowingly and wilfully, with  
11 knowledge of its fraudulent nature and with intent to  
12 defraud.

13 3. That he did use, or cause another to use,  
14 for the purpose of executing a scheme or artifice,  
15 transmissions, depending upon the count being considered,  
16 either over the telephone or through the United States  
17 Postal Service.

2/4 18 Before I go forward I want to call the following  
19 to your attention: What I have just read to you refers  
20 to action taken by the defendants and you may be  
21 wondering whether that means that each defendant must  
22 have sent a letter or had a telephone talk. It is not  
23 necessary for the government to show that the defendant  
24 you are considering himself physically committed the  
25 crimes alleged in counts 2 to 28 or, indeed, in counts 28

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2 to 53. Section 2 of Title 18, United States Code,  
3 provides that a person who aids and abets another to  
4 commit an offense is just as guilty of that offense as  
5 if he committed it himself. Accordingly, you may find  
6 beyond a reasonable doubt that a codefendant committed  
7 the offense, and that the defendant aided and abetted him.

8 To determine whether a defendant aided and  
9 abetted the commission of an offense, you ask yourself  
10 these questions: Did he associate himself with the  
11 venture? Did he participate in it as something he wished  
12 to bring about? Did he seek by his action to make it  
13 succeed? If he did, then he is an aider and abettor.

14 There is another alternative basis upon which  
15 you may find a defendant guilty on each of the substantive  
16 counts in which he is named even if you are not  
17 satisfied as to that defendant that each of the elements  
18 I have previously described for those substantive  
19 counts have been proved beyond a reasonable doubt.

20 This alternative basis is as follows:

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2 If you find beyond a reasonable doubt that  
3 the substantive offense alleged in the substantive counts  
4 were committed by one or more members of the alleged  
5 conspiracy, that the defendant you are considering was  
6 then a member of that conspiracy, and that the acts which  
7 constituted those substantive offenses were done in further-  
8 ance of a portion of that conspiracy of which that defendant  
9 was a member, and that the defendant might reasonably  
10 have foreseen that those acts would be done in the course  
11 of and to further that conspiracy, then you may find that  
12 defendant is guilty of the substantive offenses alleged  
13 in the substantive counts in which he is named, even  
14 though he did not otherwise personally participate in the  
15 acts constituting those offenses or did not have knowledge  
16 of them. That follows from the theory of partnership  
17 in crime.

18 So, as I read these essential elements to you  
19 of the mail and wire fraud and also of the securities law  
20 breach, and finally, of the false statements, where refer-  
21 ence is made to action having been taken by a defendant,  
22 you will bear in mind that if his partner did it and he  
23 was a member of that partnership and it was done in  
24 furtherance and to carry out the objectives of the partner-  
25 ship, he is just as guilty as the co-conspirator who did it.

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2 Now, I will go back and read to you the  
3 essential elements of mail and wire fraud as charged In  
4 Counts 2 to 28 so that this interruption and explanation  
5 will not have lost the thread in your minds.

22 The first element of the mail and wire fraud  
23 counts is the existence of a scheme or artifice to defraud.  
24 The language describing the first element is almost self-  
25 explanatory. A scheme or artifice is merely a plan for

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2 the accomplishment of an object. Such a scheme or  
3 artifice may be found to exist without evidence of any  
4 formal action to make effective.

Fraud is a generic term which embraces all the  
many, many means which human ingenuity can devise and which  
are resorted to by one individual to gain an advantage  
over another by false representations or suggestions or by  
suppression of the truth. Thus, a scheme or artifice  
to defraud is any plan or device by which one seeks to  
induce another to act in a way detrimental to his interests  
by means of the representations of a material fact which  
are false and untrue. Such representations may be made  
in two ways -- by statements of a material fact which are  
just not true and by the omission from a statement pur-  
porting to state a particular fact or facts of other  
material facts which are necessary to a proper understand-  
ing of the truth of the matters stated.

In other words, once having undertaken to state a fact or facts, there is an obligation on the one who does so not to give such a distorted picture of them as to make the statements misleading concerning what the actual facts really are. Sometimes a half-truth is no better than an outright falsehood and a fraudulent representation may be effected by half-truths calculated

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2 to mislead. Having chosen to speak, there is an  
3 obligation to state all the facts which are necessary to  
4 a proper understanding of the particular subject matter  
5 which is being covered.

6 A statement, although literally true, is none-  
7 theless false if when interpreted in the light of the  
8 effect it would produce on the minds of those whom it was  
9 calculated to influence, it would create a false impression  
10 of the true state of affairs.

11 I have told you that the second element of the  
12 mail and wire fraud charges is the requirement that the  
13 act should be wilfully and knowingly done. This second  
14 element of the mail and wire fraud charges which the  
15 Government must establish beyond a reasonable doubt is  
16 that when and if the defendant did the acts with which he  
17 is charged, he acted wilfully and knowingly -- the defendant  
18 or his partner in crime, if there be any.

19 The word "knowingly" means that the defendant  
20 acted purposely and deliberately. As used here, "wil-  
21 fully" means intentionally, with a bad purpose and specific  
22 intent to do that which the law forbids.

23 In other words, to convict on any particular  
24 substantive count, you must find that as to that count the  
25 defendant you are considering purposely did, himself or

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2545

2 through his partner, if he had one, the acts with which he  
3 is charged and did not carelessly or negligently or through  
4 inadvertent error or mistake or something of that nature  
5 do the act.

6 Under these statutes, a false representation  
7 or omission to state a material fact does not amount to a  
8 fraud unless it is made with fraudulent intent. However,  
9 misleading or deceptive a plan may be, the use of the  
10 mails or the telephone to execute it does not constitute  
11 a crime if the plan was devised in good faith. Honesty  
12 and good faith on the part of a defendant is always a  
13 good defense to the charges in these counts and an honest  
14 belief in the truth of the representations made by him is  
15 a good defense, however inaccurate the statements may turn  
16 out to be.

17 The significant fact is the specific criminal  
18 intent and the bad purpose with which the defendant acted.  
19 The mere fact that a statement may be incorrect or even a  
20 gross misrepresentation of the facts does not amount to a  
21 fraud in the law unless the statement was made by the  
22 defendant knowingly and wilfully and with the specific  
23 intent to deceive.

24 The question of the defendant's knowledge and  
25 his intent and his wilfulness is a question of fact you

2 must decide in this case but, unlike most other questions  
3 of fact, it involves what is in a person's mind or the  
4 purpose which motivates him in a given course of conduct.  
5 Obviously, we have not yet devised, and perhaps it is  
6 well if we never do, an instrument to record what goes on  
7 in a man's or a woman's mind. Rarely is direct proof  
8 available that a man has knowledge of a particular fact or  
9 has a particular purpose in mind when he acts. On occasion  
10 he may write a letter or admittedly have knowledge that a  
11 statement was false or acknowledge orally that he had an  
12 evil or forbidden purpose, but that is rare. Plainly, it  
13 is the exception rather than the rule.

14 Thus, direct proof of the knowledge of a falsity  
15 and a wilful and wrongful intent is not necessary.  
16 Usually, such knowledge or purpose is established by  
17 circumstantial evidence and determined from the acts and  
18 conduct and all the circumstances and the natural inferences  
19 that you may draw therefrom.

20 Fraudulent intent may be inferred from the  
21 intent of one party to a transaction to deprive another of  
22 the chance to bargain with the facts before him. Thus,  
23 where false representations are made as to the quality,  
24 adequacy or price of goods or property, fraudulent intent  
25 may be inferred if the jury so decides from the fact that

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2       the victim was made to bargain without facts obviously  
3       essential in deciding whether to enter into the trans-  
4       action.

5               I have previously instructed you on the meaning  
6       of false statements and misrepresentations. Remember  
7       that they may be made either by statements which are direct  
8       untruths, such as to say that something happened when it  
9       did not, or by statements of half-truths leaving out a part  
10      of the facts necessary to an understanding of the complete  
11      truth.

12              Remember, also, that the misrepresentations  
13      must be material; that is, of such a nature that it would  
14      tend to influence a reasonable person's decision whether to  
15      act or not.

16              If you find that the defendant under consider-  
17      ation knowingly and wilfully engaged in the scheme to  
18      defraud, you must then consider the next element of the  
19      offense charged, that is, whether the mails or telephones  
20      were used in furtherance of that scheme.

21              The Government alleges that the defendants  
22      mailed or caused to be mailed letters relating to Select  
23      stock and its distribution, sale and transfer. It is  
24      also alleged that telephone calls were made to transmit  
25      information necessary to transactions in Select stock.

2 It is not necessary that the matter thus com-  
3 municated contain in itself anything criminal or objection-  
4 able or any misrepresentations or that disclose a fraudulent  
5 purpose of show that it was in furtherance of the scheme.  
6 The matter may be wholly innocent in itself. Nor is it  
7 necessary that the defendant under consideration personally  
8 mail, telephone or otherwise transmit the alleged matter.  
9 You need only find that the defendant caused the trans-  
10 mission by taking steps which he knew at the time might  
11 naturally and probably result in the use of the mails or  
12 telephone.

13 The next group of counts, Nos. 29 through 40,  
14 charge the defendants with 12 separate violations of  
15 Section 17-A of the Securities Act of 1933. Again, you  
16 will bear in mind what I told you about the means by which  
17 you can consider a defendant other than the one who  
18 actually acted.

19 To convict a defendant of any of these counts,  
20 you must find beyond a reasonable doubt as to the count you  
21 are considering each of the following elements:

22 First, that in connection with the offer or  
23 sale of the securities, the defendant engaged in a scheme  
24 or artifice to defraud or to obtain money or property  
25 by means of untrue statements of material facts or omis-

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2549

2 sions to state material facts necessary in order to make  
3 his statements not misleading, or engaged in a trans-  
4 action, practice or course of business which would or did  
5 operate as a fraud or deceit upon the purchasers of that  
6 security.

7 Second, that the defendant did so wilfully and  
8 knowingly; and,

9 Third, that the defendant used or caused to be  
10 used the mails or means of communication in interstate  
11 commerce in furtherance of the scheme.

12 Section 17-A which deals directly with  
13 securities fraud, is very similar to the mail and wire  
14 fraud statutes as to which I have already instructed you,  
15 and you will follow those instructions in considering the  
16 Section 17-A counts. In particular, you remember that  
17 false representations can be made either by statements of  
18 a material fact which are just not true or by the omission  
19 to state material facts which are necessary to a proper  
20 understanding of the matters stated, and you will also  
21 remember that a scheme or artifice to defraud is any plan  
22 or device by which one person seeks to induce another to  
23 act in a way detrimental to his interests by means of  
24 untrue representations as to a material fact.

25 Section 17-A, however, has the further require-

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2                   ment that the acts be done in connection with the offer  
3                   or sale of any securities.     I instruct you that Select  
4                   stock is a security for purposes of Section 17-..

5                   I further instruct you that an offer or sale of  
6                   a security includes every contract of sale or disposition  
7                   of the security or of an interest in the scurity for value.  
8                   Thus, for example, an offer or sale of the security  
9                   occurs when a security is sold for money or when it is  
10                   exchanged for property, such as a fur coat, or when it is  
11                   pledged to secure a loan from a bank or other lender or  
12                   when it is pledged to provide further security for an  
13                   existing loan or debt.

14                   Now, we are almost through.

15                   Counts 41 through 51 charge the defendants with  
16                   11 separate violations of Section 5-A of the Securities  
17                   Act of 1933.     To convict a defendant of any of these  
18                   counts, you must find beyond a reasonable doubt as to the  
19                   count you are considering each of the following elements:

20                   First, that the defendant unlawfully, wilfully  
21                   and knowingly used or caused to be used the mails or inter-  
22                   state facilities to sell Select stock, or through such  
23                   facilities caused to be carried the stock in connection  
24                   with sales;

25                   Second, that the Select stock sold was not

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2551

2 registered with the SEC, although required to be registered  
3 by the Securities Act of 1933.

4 So far as concerns the first element, I have  
5 already instructed you concerning the use of the mails and  
6 interstate facilities and you will apply those instructions  
7 here.

8 It was stipulated here that no registration  
9 was ever filed for Select Enterprises stock. The Govern-  
10 ment has contended throughout this case that the defendants  
11 caused to be sold or aided and abetted in the sale of  
12 unregistered stock in public offerings thereof.

13 Counts 41 through 51 involve mailings or  
14 interstate facilities.

15 A third and another essential element of this  
16 offense is that the defendant knew that the offer, delivery  
17 and sale of Select Enterprises stock required the filing  
18 of a registration statement and wilfully and knowingly  
19 caused the use of the mails or interstate facilities  
20 directly or indirectly in the sale or delivery of these  
21 unregistered shares. It is not necessary for the Govern-  
22 ment to establish that the defendant knew he was breaking  
23 any particular law or any particular rule. Here, as in  
24 other phases of this case, the significant fact is the  
25 particular defendant's state of mind. My instructions

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2552

2 as to wilfulness, knowledge, specific intent and evil  
3 motive or purpose apply to these counts as well as to the  
4 others.

5 The law would exempt the transactions here  
6 involved if no public offering were involved. Offering  
7 shares through the pink sheets does involve a public  
8 offering and if you find that Select stock was so offered  
9 by Select through dealers who went into the pink sheets  
10 at its behest, a public offering is involved by an issuer.

11 We come now to the last two counts, 52 and  
12 53, which charge the defendants with making false statements  
13 to the SEC -- the Securities and Exchange Commission.

14 The statute involved which I have already read  
15 to you makes it a crime knowingly and wilfully to use a  
16 false writing or document in a matter within the juris-  
17 diction of any agency or department of the United States.

18 To convict on either of these counts, the  
19 Government must prove beyond a reasonable doubt the follow-  
20 ing:

21 First, on or about the dates specified in the  
22 Southern District of New York, the defendant you are con-  
23 sidering did make or use the writing or document specified;

24 Second, such writing or document contained  
25 material false, fictitious or fraudulent statements or

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2                   entries;

3                   Third, the defendant knew that the writing or  
4                   document contained such material false, fictitious or  
5                   fraudulent statements or entries; and,

6                   Fourth, such writing or document was used in a  
7                   matter within the jurisdiction of the department or agency  
8                   of the United States, and the Securities and Exchange  
9                   Commission is such an agency.

10                  The mail, wire and securities fraud statutes  
11                  and the false statements statute all involve the concept of  
12                  materiality. The securities fraud statute employs the  
13                  word "material" when speaking of a misrepresentation of a  
14                  material fact or the omission to state a material fact.  
15                  The falsity involved in mail or wire fraud or in a false  
16                  statement to the SEC must likewise be material. A  
17                  fact is material if it is one which would induce a reasonable  
18                  person to act because of it; that is, if it affects conduct.  
19                  For example, with respect to a securities fraud, a fact is  
20                  material if it would induce a reasonable investor to  
21                  purchase or to refrain from purchasing a security.

22                  With respect to the false statement statute, a  
23                  fact is material if it reasonably tends to affect the  
24                  conduct of an investigation.

25                  Proof of motive is not a necessary element of

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2554

2 the crimes with which the defendants are charged. Proof  
3 of motive does not establish guilt nor does want of proof  
4 of motive establish that a defendant is innocent. If the  
5 guilt of the defendant is shown beyond a reasonable doubt,  
6 it is immaterial what the motive for the crime may be or  
7 whether any motive be shown but the presence or absence  
8 of motive is a circumstance which the jury may consider as  
9 bearing on the intent of the defendant.

10                   Ladies and gentlemen of the jury, use your  
11 common sense in evaluating the evidence, the circumstances  
12 and the probabilities. Do not allow yourselves to be  
13 swayed or carried away or inflamed by Appeals to passion or  
14 sympathy. Suspicion and conjecture should not be  
15 substituted for proof or evidence. Suspicion and con-  
16 jecture are not in evidence. You must maintain a calm,  
17 clear view of the case and not be sidetracked by anything  
18 or anybody from a fair, dispassionate consideration of the  
19 evidence in arriving at your resolution of the facts.

20                   Under your oath as jurors, you cannot allow any  
21 consideration of the punishment which might be inflicted  
22 upon a defendant, if convicted, to influence your verdict in  
23 any way or in any sense enter into your deliberations.  
24 The duty of imposing sentence rests exclusively upon this  
25 Court. Your function is to weigh the evidence in the

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2555

2 case and determine whether the defendant is guilty or not  
3 guilty, solely on the basis of the evidence and the law.

4 You are to decide the case upon the evidence  
5 and the evidence alone and, I repeat, you must not be  
6 influenced by any assumptions, conjectures, sympathy or any  
7 inference not warranted by the facts unless proved to your  
8 satisfaction.

9 I want you to listen to each other carefully  
10 in the jury room when you consider the matter. If you  
11 think you are wrong and somebody else is right, don't be  
12 embarrassed about changing your opinion but, remember, each  
13 of you has to decide the case for yourself.

14 Each defendant must be considered by you  
15 separately and each count as to that defendant must be  
16 considered separately.

17 A verdict of guilty or not guilty as to any  
18 count on which the respective defendant is charged, to be  
19 acceptable, must be unanimous. You may, if you wish,  
20 report your verdicts separately from time to time as you  
21 reach them, unanimously, if that will aid you in your  
22 deliberations or you may wait until you have concluded  
23 all of your deliberations.

24 The oath you took right at the outset really  
25 sums up what you are supposed to do in this case and that

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2556

2       is, without fear or favor to anybody, you will well and  
3       truly try the issues according to the evidence and the law  
4       as stated to you in this charge.

5               If you desire any of the exhibits, those will  
6       be sent to you in the jury room upon request. If you  
7       want any of the testimony read, that can be done, also.

8               Please do not communicate with anyone concerning  
9       your deliberations about this case or how you stand, except  
10      in writing, signed by your foreman, and he will be provided  
11      with a pencil and paper by the marshals.

12              Now, I have concluded my charge but I would  
13      like to take a moment to talk to the lawyers at the side  
14      bar, who may wish to call to my attention any matter that  
15      I have overlooked or where I may have misspoken, and I will  
16      therefore excuse you to go into the jury room, but not to  
17      discuss this case or commence your deliberations; just go  
18      in there for a short recess while I take these legal matters  
19      up with the lawyers and then I will have you back for the  
20      concluding statement.

21              (The jury left the courtroom.)

22              THE COURT: I will now consider exceptions and  
23      requests.

24              Does the Government have any exceptions or  
25      requests?

1 || jb jw 17 Segal - direct

2 THE COURT: 7-A, 7-G and 8 are admitted.

3 Q Mr. Segal, did you have some telephone conver-  
4 sation or conversations with respect to obtaining the  
5 signature on those contracts on behalf of Select Enter-  
6 prises?

7           A       I called Mr. Joe Boyd immediatley and I wanted  
8           to fly to Texas to have these things signed or ask Mr.  
9           Boyd to please come into New York, if he could.

20 THE COURT: We will suspend here for the  
21 luncheon recess.

22 The jury may go out. Are you signaling to  
23 me or just taking your glasses off?

24 JUROR NO. 6: I am just taking my glasses off.

25 THE COURT: The jury may go out and we will

1 pgs Segal-direct 192

2 to him, and that I had to take all precautions about  
3 delivering stock to anybody because there definitely is a  
4 short in the market, somebody is hitting the market with  
5 stock that they don't possess.

6 Later on the stock was bought back by another  
7 company which was Forsite Fund; probably a week later it  
8 was bought back at a lower price, so I was correct in assum-  
9 ing that it was a short.

10 Q On that Sunday, March 1st, 1970, did you have  
11 occasion to travel to Texas?

12 A Yes.

13 Q Will you tell the jury who were the people  
14 you met with there and what, if anything, occurred on that  
15 occasion?

16 A I met with Mr. Joe Boyd and Mrs. Boyd and Mr.  
17 Knisely and they signed the contracts; the appointment was  
18 set up early in the week and they signed the contracts  
19 that Sunday for Select's purchase of Diamond Bros. and  
20 Select's purchase of Riverside Hotel.

21 Q I would like to direct your attention to Exhibit  
22 7-F before you and ask you to look at that and the signature  
23 page in particular and tell the jury if you are able to  
24 identify it.

25 A Yes. That's a copy of the contract that was

2 Q Where did you meet him?

3 A In the hotel room, or somebody that presented  
4 himself as Dr. Knisely, in a hotel room in Texas.

5 Q Do you know if Dr. Knisely is in the courtroom?

6 A Is there somebody sitting behind you? Let me  
7 take a good look.

8 (Pause.)

9 I think it is that gentleman in the gray suit  
10 (indicating). I am not sure. It has been six years  
11 ago. Is that the one you mean?

12 MR. LESSER: Dr. Knisely, stand up.

13 (The defendant Knisely arose.)

14 THE WITNESS: I think so, yes.

15 Q Did you ever see Dr. Knisely sign these contracts  
16 that you refer to, more specifically, the Diamond Bros.  
17 contract?

18 A Did I ever see him sign it?

19 Q That's right?

20 A Yes, I did.

21 Q How about the Riverside --

22 A Same thing. It was on a little end table in  
23 the hotel room.

24 Q I refer you to Government Exhibit 3503.

25 Do you refer your testimony before the grand

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Segal-cross

284

2 jury on December 18, 1974?

3 A Do I recall it? I don't know. Bring it to  
4 my attention. December 18 when?

5 Q 1974. You appeared before the grand jury.

6 A Yes.

7 Q You testified?

8 A Yes.

9 Q Were you asked this question and did you give  
10 this answer on page 11, line 11:11 "Q Did you thereafter fly to Texas to obtain  
12 signatures of someone on behalf of Select?13 "A Yes. The very next day I flew to  
14 Texas to Mr. Boyd who had Mr. Knisely sign both  
15 contracts so that I could take it back and get it to  
16 the brokers' office the following morning at 9 o'clock,  
17 delivered to their door, so that they would have it  
18 available for the Securities and Exchange Commission  
19 when they were supposed to attend a hearing."20 Were you asked that question and did you give  
21 that answer?

22 A Yes.

23 Q Did you have Dr. Knisely sign the contract or  
24 did you give it to Mr. Boyd?

25 A I gave it to Mr. Boyd. I met Mr. Knisely and

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Segal-cross

2 I was certain that Mr. Knisely signed the contract --  
3 unless I turned my back, or went into the men's room, and  
4 Mr. Boyd signed the contract for Mr. Knisely. I could  
5 only tell you that I was in a room with the gentleman.  
6 His function was to sign the contracts. Whether or not  
7 I turned my back and someone else signed the contract, I  
8 cannot be certain of that.

9 Q Did you discuss the contents of the contract?

10 A I did.

11 Q With Dr. Knisely?

12 A Not in detail.

13 Q Did you tell him what he was signing?

14 A Did I tell him? That was the duty of Mr.  
15 Boyd. I was just a messenger. I ran and had the  
16 contracts signed so that they could be delivered back.

17 Q And wasn't Dr. Knisely a messenger of Dr. Boyd  
18 in connection with that same transaction?

19 A I can't imagine. If we talked outside I could  
20 give you my version of it, but I cannot guess. I don't  
21 know.

22 Q Did you have any contact with Dr. Knisely with  
23 respect to the contents of any of these transactions?

24 A Not at all.

25 MR. LESSER: Your Honor, I have nothing further.

1 pgs

Chapel - cross

909

2 meeting?

3 What transpired?

4 Q Yes or no.

5 A Yes. To the best of my recollection I have  
6 testified to that.7 Q I show you Defendant Mullenax Exhibit C for  
8 identification. By looking at that, Dr. Chapel, can you  
9 state whether or not that particular transaction occurred  
10 on or about March 26, 1970?11 A To the very best of my recollection Donald E.  
12 Rouse, who is mentioned in this document, was not at that  
13 board of directors' meeting and this would be --14 Q I am not asking you whether or not he was  
15 present. I am asking you whether or not the transaction  
16 reflected by that document occurred at the meeting?

17 A I don't recall it.

18 MR. EHRLICH: I have no further questions.

19 THE COURT: Mr. Lesser?

20 CROSS EXAMINATION

21 BY MR. LESSER:

22 Q Dr. Chapel, my name is Mr. Lesser. I represent  
23 Dr. Knisely.

24 How long do you know Dr. Knisely?

25 A A long time. Back, as I recall, the late '50s.

2 That's when I met him.

3 Q Doctor, you testified to a loan at the Texas  
4 Bank & Trust Company of Dallas some time in February of  
5 1970?

6 A I missed the last part.

7 Q Some time in February of 1970. I think it was  
8 February 20th, 1970. That was a loan for \$15,400.

9 Do you recall that?

10 A Yes, I do.

11 Q I believe you testified that you and Mr. Bickel  
12 signed a personal note to the bank for that loan?

13 A We signed a note, yes.

14 Q As collateral there was 50,000 shares of stock  
15 of United American Industries that belonged to Dr. Knisely?

16 A Yes. That's correct.

17 Q Did Dr. Knisely get any part of the proceeds  
18 of that note?

19 A Of the note?

20 Q Of the loan.

21 A Not to my knowledge he didn't, no.

22 Q Were you examined by Mr. MacDonald before the  
23 grand jury in this building on December 19th, 1974?

24 A Yes, sir.

25 Q You testified there, did you not?

2 A Yes.

3 Q I call your attention to some questions and  
4 answers that you were asked on page 25, line 9. Did you  
5 give these answers to these questions:

6 "Q Finally, do you know Mr. Knisely?

7 "A Yes.

8 "Q Can you tell us what his role was with  
9 respect to Select Enterprises?

10 "A Well, he, on wherever I saw a sheet of  
11 paper of any kind with his name of the president on  
12 it, it always said Dr. Mike Knisely, president, so  
13 I assumed he was the president of the corporation.

14 "However, I -- his part, the part that he  
15 played, as far as I can tell, was an inactive one,  
16 because I don't remember ever seeing him in the  
17 various Select offices or I don't believe I ever saw  
18 him with Joe Boyd in regard to Select Enterprises."

19 Do you remember giving those answers to those  
20 Questions?

21 A Yes, I do.

22 Q Was that the true situation?

23 A It is essentially true. However, may I make  
24 a slight qualificatin?

25 Q Answer the question.

4 THE COURT: What is the part that is not  
5 essentially true?

6 THE WITNESS: The part I would change would be  
7 relative to the fact that I did in fact see him at the  
8 Abilene meeting.

9 Q He didn't participate in any discussion, did he?

10 A I don't recall him participating at all.

11 MR. LESSER: That's all. Thank you.

12 MR. BERGER: No questions, your Honor.

13 MR. DULSKY: No questions, your Honor.

14 MR. CONCANNON: No questions, your Honor.

15 MR. ROONEY: No questions, your Honor.

16 CROSS EXAMINATION

17 BY MR. BRODERICK:

18 Q Mr. Chapel, I represent Michael Gardner.

19 You mentioned that you prepared some sort of  
20 newsletter; is that correct?

21 A Yes.

22 Q That is Exhibit 4-A?

23 A I have forgotten the exhibit number.

24 Q Where did you prepare that newsletter?

25 A Where?

Q Yes.

A My best recollection is that it was in Room 2717.

1 pgas6

Elms - cross

2 THE WITNESS: I have never seen this letter,  
3 your Honor, until the United States Attorney's Office  
4 showed it to me.

5 THE COURT: When was that? In what year?

6 THE WITNESS: In 1975.

7 (Pause)

8 MR. STOKAMER: No questions, your Honor.

9 MR. GOLDMAN: No questions, your Honor.

10 THE COURT: Is there any other defendant that  
11 wishes to cross-examine the witness?

12 MR. LESSER: I do have one question, your Honor.

13 THE COURT: Subject to the discussion we had,  
14 Mr. Krieger, you are privileged to go forward, if you wish.

15 MR. KRIEGER: If your Honor please, I feel that  
16 I cannot.

17 THE COURT: That's your choice.

18 Mr. Lesser, you may proceed.

19 CROSS-EXAMINATION

20 BY MR. LESSER:

21 Q Mr. Elms, may I refer you to Exhibit 1, the  
22 letter of Mr. Knisely.

23 THE COURT: Exhibit 1 comprises all three pages  
24 of the exhibit that you have.

25 Q Do you know Dr. Knisely, the signer of that letter?

1 pgas7

Elms - cross

1357

2 A No, sir, I do not.

3 Q So he was not present during any conversations?

4 A No.

5 MR. LESSER: Thank you.

6 THE COURT: Anybody else?

7 CROSS-EXAMINATION

8 BY MR. RHODES:

9 Q My name is Rhodes, Mr. Elms. I represent  
10 Mr. Barnett, another accountant.11 I want to ask you specifically, did you prepare  
12 the engagement letter and address it to Select Enterprises?13 A Are you referring to the letter on top of  
14 Exhibit 1?

15 Q Yes, sir.

16 A Yes, sir.

17 Q Did you prepare at least a portion of this?

18 You stated that all of the words contained therein were  
19 not in the letter you prepared; is that correct? Am I  
20 correct?21 A The top letter is signed by me and that's the  
22 only thing I had seen before.23 Q I was mistaken then. You were referring to the  
24 second page of Exhibit 1 --

25 THE COURT: Mr. Segal was referring to the last

1 pgas12 Maxson - cross

2 is that correct?

3 A Right.

4 Q Do you recognize that writing as Mr. Goodloe's  
5 signature?

6 A I don't recall ever having seen Mr. Goodloe's  
7 signature before, if this is his signature.

8 Q You never saw it before or since; is that  
9 correct?

10 A That's true.

11 Q Isn't it also correct that it was not signed  
12 in your presence?

13 A That's right.

14 Q After you received the letter, did you ever  
15 discuss the letter or its contents with Mr. Goodloe?

16 A No.

17 MR. STOKAMER: I have no further questions.

18 MR. LESSER: I have some questions, your Honor.

19 THE COURT: Mr. Lesser is representing  
20 Mr. Knisely.

21 CROSS-EXAMINATION

22 BY MR. LESSER:

23 Q Mr. Maxson, my name is Mr. Lesser and I  
24 represent Dr. Knisely.

25 You testified that you got a phone call from

1 pgas13

Maxson - cross

1499

2 Dr. Knisely sometime on April 15, 1970.

3 A That's true.

4 Q You testified that he had some documents with  
5 him; is that correct?

6 A Well, in our telephone conversation he said  
7 he had some things he had received and he didn't know  
8 what they was all about.

9 Q Did he show you these papers he had received?

10 A He then, later that day, I think in the  
11 afternoon, brought them into my office.

12 Q At that time he had asked you what they were;  
13 is that correct?

14 A Yes. I think we discussed it.

15 Q Were they papers connected with Select  
16 Enterprises?

17 A That is true.

18 Q You say that when he left, he left these papers  
19 behind?

20 A He left them on my desk.

21 Q That was back in 1970.

22 Did you make any effort to return them to him  
23 from 1970 to 1974?

24 A They lay there for a long time, and I took the  
25 papers and put them down in the lower part of my desk,

1 pgas14

Maxson - cross

1500

2 just lay them down there, and I thought the next time  
3 I saw him I would tell him to come in and get these  
4 papers, that they may be important to him, but I had told  
5 him at that time that he should talk to Mr. Boyd about  
6 these papers because there might be something that he  
7 needs to do something about.

8 Q Did he tell you he didn't know what they were  
9 all about?

10 A He told me that he didn't know what it  
11 represented at the time we talked on the telephone, and  
12 when he brought them in to me I said, "I think it is  
13 something relative to the Securities and Exchange  
14 Commission and you better do something about it."

15 Q Dr. Knisely's office was near your office,  
16 correct?

17 A It was several blocks away.

18 Q Did you see him often during that period?

19 A I used to see him often. He is a very fine  
20 fellow.

21 Q At any rate, the papers were never returned to  
22 him; is that correct?

23 A That's right.

24 MR. LESSER: That's all.

25 THE COURT: Anyone else?

1 bs12

Ford - cross

1992

2 A Yes, sir.

3 Q When you said, "Goodloe is right", did that  
4 refer to a question and answer on that same page starting  
5 on line 11 and going on to line 12?

6 In other words, was the question on line 11:

7 "Who was handling this deal", a question by  
8 Officer Hewitt to Mr. Goodloe?

9 A I see that.

10 Q Is that correct?

11 A Yes, sir.

12 Q And Mr. Goodloe's answer was:

13 "Well, Joe Boyd is the one that handled this";  
14 is that correct?

15 A Yes, sir.

16 Q When you said "Goodloe is right", was that the  
17 question and the answer that you were referring to?

18 A I think it was.

19 MR. STOKAMER: Thank you.

20 I have no further questions.

21 THE COURT: Anybody else?

22 CROSS EXAMINATION

23 BY MR. LESSER:

24 Q Mr. Ford, I represent Dr. Knisely.

25 You have known him for quite some time, have you

1 bs13

Ford - cross

1993

2 not?

3 A Yes, sir.

4 Q With respect to the March 26, 1970 board of  
5 directors meeting, you were present?

6 A Yes, sir, for a short time.

7 Q Dr. Knisely was there, too?

8 A Yes, sir.

9 Q Did he conduct the meeting?

10 A I don't think so.

11 Q Did he participate in that meeting in any way  
12 as far as you remember?

13 A Except by his physical presence, no.

14 Q That's all he did?

15 A Yes, sir.

16 Q And he signed the board of directors meeting as  
17 present, did he not, the minutes, as being present?

18 A I didn't see him sign that.

19 Q But it's signed. You saw the completed copy,  
20 did you not?

21 A Yes. I am having some trouble remembering.

22 I think it was April 17 or maybe the 22nd that I saw  
23 that.

24 MR. LESSER: Thank you.

25 THE COURT: Anybody else?

2 MR. MacDONALD: No, sir.

3 THE COURT: I will call upon the counsel for  
4 the defendants in the usual order.

5 Mr. Segal, are there any exceptions to the  
6 charge?

7 MR. SEGAL: Your Honor, my first exception would  
8 be with regard to the Court's statement in which it  
9 juxtaposed the failure of the defendant to take the stand  
10 with the presumption of innocence, as if the failure in  
11 some way was in derogation of presumption of innocence.  
12 I felt that that could have been clarified in the charge  
13 as requested.

14 My second request, your Honor, is that in  
15 giving the reasonable doubt charge to the jury, the Court  
16 included in its statement the fact that it is impossible to  
17 have no doubt or that there can be a mathematical certainty  
18 and I felt that by juxtaposing those two concepts, about  
19 the reasonable doubt and the fact that it is impossible to  
20 have no doubt, that the jury may not have gotten a clear  
21 view of reasonable doubt.

22 The third objection, your Honor, is with regard  
23 to the inference example, because I felt that where there is  
24 smoke there is a fire conclusion, there is no guide except  
25 evidence which legitimately can sustain the conclusion, as

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2558

2 the Court stated, gave them no clear idea of the inference,  
3 the circumstantial example. In that connection, I would  
4 object to the Court's failure to charge the two inference  
5 rule as proposed in the requests to charge made in court.

6 The main thrust of my objection, your Honor,  
7 would be in connection with the Court's description of  
8 Section 5 in connection with the explanation given in the  
9 conspiracy count. In that example of the potential  
10 statutes which the jury has to consider, the Court laid  
11 out those sections of the 1933 Act which are necessary and,  
12 in the Section 5 example, there was no relationship or  
13 explanation of the grandfather clause or the pre-33  
14 registration which we have continued, or any explanation  
15 of in what way the shares of stock in this case may be  
16 either exempt from or subject to registration.

17 For the moment, I would move on to the Section  
18 5-A example that the Court gave and the substantive counts  
19 toward the end of the charge. The Court indicated that  
20 while there was a stipulation that no registration state-  
21 ment was filed, there was no explanation that the defendants  
22 may have been operating under an exemption and, in fact,  
23 there is testimony in the transcript of Mr. Boyd in which  
24 in speaking with Mr. Hewitt he indicated a difference of  
25 opinion and, in fact, an ignorance of the fact that registra-

1 jbs

2559

2 tition was required for this type of a corporation, so that  
3 the contention has not been fully explained.

4 I think also, your Honor, and I would urge that  
5 the Court reconsider its Section 17-A substantive charge,  
6 or at least review it. As my notes give it, in the offer  
7 of sale or contract of sale of disposition of a security,  
8 the Court, I believe, stated that a sale occurs when it is  
9 sold for money, when it is exchanged for property, when it  
10 is pledged to secure a loan and as a further security for  
11 existing loan or debt.

12 I think that there is a case which may be  
13 squarely against that pledge idea that the Court has  
14 proposed, which is McClure versus First National Bank of  
15 Lubbock, Texas. It is a Fifth Circuit case, 497 Fed. 2  
16 490, and I believe that the holding there is that the pledge  
17 of unissued stock as collateral does not constitute a sale  
18 within the Securities Act in the circumstance where the  
19 bank does not subsequently sell the stock, so that in an  
20 instance where a stock is held by the bank and is not  
21 disposed of, it cannot be said to have constituted a sale.  
22 That is the only holding, frankly, that I could find.

23 I don't know if any Second Circuit case exists  
24 in that regard but there is at least a Fifth Circuit case  
25 and I believe that the cite to the particular section that

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2560

2 I am talking about would be about the last page or two of  
3 that opinion.

4 THE COURT: Is that all?

5 MR. SEGAL: Your Honor, under the grandfather  
6 clause situation, I am not certain but that the application  
7 which is made to the National Quotations Bureau specifically  
8 makes provision in that application which is in evidence,  
9 for the fact that there is some exemption which is relied  
10 upon in requesting the listing, so that that at least would  
11 be some evidence as to that incident. At least, we are  
12 contending that there was a proper use or a proper sale.

13 THE COURT: Is that it?

14 MR. SEGAL: I just have a few more items, your  
15 Honor.

16 My note is something about necessity for regis-  
17 tration without instructing the jury whether or under what  
18 circumstances registration of the shares was necessary.  
19 I believethat in reciting Section 17 violation, the Court  
20 talked about a material fact and, of course, later in its  
21 charge the Court did explain what a material fact was.  
22 I just felt that in the Section 17 explanation, that an  
23 explanation of the material fact should have been given  
24 at that point.

25 The Court had been requested in my request

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2561

2 No. 17, I believe, in the last sentence, that is about  
3 independent evidence must be substantial. I believe  
4 that it may be of some assistance if the Court would con-  
5 sider that last full sentence of request No. 17 to include  
6 in any amendment to the charge.

7 THE COURT: I believe the charge adequately  
8 covers that in words and by implication, although not  
9 necessarily in your own words.

10 MR. SEGAL: Your Honor, in explaining the sub-  
11 stantive counts, the Court indicated that there are two  
12 bases upon which the jury could find and one would be the  
13 aiding and abetting and the other would be in essence the  
14 Pinkerton theory. I am not sure, frankly, your Honor,  
15 whether or not the Court can charge the aiding and abetting,  
16 even though the indictment is silent as to that -- whether  
17 that is included --

18 THE COURT: That's the law. It is read into  
19 every indictment.

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2 MR. SEGAL: With regard to the Pinkerton  
3 theory, it is complicated for lawyers, and I think maybe  
4 it is incomprehensible to laypeople, but in charging on  
5 that Pinkerton theory they may reach a conclusion --  
6 I believe that it is impossible for a jury to distinguish  
7 between the need for individual consideration as to the  
8 substantive counts and whatever findings and protections  
9 it has to receive with regard to the conspiracy counts.

10 I have no further objections, your Honor.

11 THE COURT: I am going to call to your attention  
12 that neither you nor any defendant made any requests  
13 in respect of the grandfather's clause or appropriate  
14 requests on the subject of exemptions. I think it is a  
15 late moment to raise that kind of discussion, but if you  
16 can write out some brief indication of what you believe  
17 should be charged, and the circumstances are such that I  
18 do not require an examination of the law to determine  
19 the validity of your legal principles, I may give it  
20 further consideration by the time I come around to you a  
21 second time.

22 Mr. Stokamer?

23 MR. STOKAMER: I have nothing in addition to  
24 what Mr. Segal raised. I would like to join him in his  
25 requests.

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2563

2 MR. SEGAL: May I be excused for one moment,  
3 your Honor? I may be able to make a phone call that  
4 would help.

5 THE COURT: Yes.

6 Mr. Goldman:

7 MR. GOLDMAN: Are we deemed to have repeated  
8 the other requests and exceptions by other counsel?  
9 I think that would save time.

10 THE COURT: Yes, and you will be deemed also  
11 to have failed to present any requests to charge on the  
12 matters raised. It works both ways.

13 Anything else?

14 MR. GOLDMAN: Yes, your Honor.

15 I would except to your Honor's charge on  
16 accomplice. I believe you used the words "greater care  
17 or caution," and I believe that that diluted the standard.

18 THE COURT: How would you charge it?

19 MR. GOLDMAN: Extreme care and caution, or  
20 some words to that effect.

21 THE COURT: All right.

22 MR. GOLDMAN: Your Honor said, in effect, if the  
23 jury finds there is a conspiracy to commit any of the  
24 crimes in the first indictment, and an overt act committed  
25 in the Southern District of New York in furtherance of

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2564

2 that crime, that conspiracy, then you may find the  
3 defendants guilty.

4 I ask your Honor to charge specifically if they  
5 find there was a conspiracy to commit one of the crimes  
6 in that indictment, they must find that an overt act  
7 directed towards that particular conspiracy must be  
8 committed in the Southern District of New York. In effect  
9 there were four conspiracies rolled into one. The jury  
10 may find that there is one, but yet, as to the one they  
11 feel --

12 THE COURT: I would think that you would mount  
13 confusion on confusion by asking me to add to what I think  
14 is otherwise a very clear statement of the multiple  
15 conspiracy situation as announced by the Court of Appeals  
16 in a case that was tried by Judge Duffy. I assume you  
17 are familiar with the case I am talking about.

18 MR. GOLDMAN: Tramonti?

19 THE COURT: Yes.

20 MR. GOLDMAN: The problem here is that there  
21 are certain problems for some defendants who never left  
22 Nevada or Texas, or whatever, and although I realize  
23 there is confusion, I think that is caused by the  
24 inclusion of one --

25 THE COURT: That would breed confusion rather

2 than clear anything.

3 Is there anything else?

4 MR. GOLDMAN: I go along with that.

5 I would except to the Pinkerton charge in view  
6 of the fact that it is over the broad scale conspiracy  
7 charged in the first count.

8 THE COURT: Mr. Richman?

9 MR. RICHMAN: The defendant Titlow has no  
10 objections or exceptions to your Honor's charge.

11 THE COURT: Mr. Ehrlich?

12 MR. EHRLICH: Your Honor, the defendant  
13 Mullenax respectfully excepts to your Honor's charge with  
14 respect to the Pinkerton theory, that charge regarding  
15 conspirator's alleged responsibility of substantive  
16 offenses on the ground it violates the double jeopardy  
17 provisions of the Fifth Amendment.18 Secondly, we respectfully except to your Honor's  
19 charge with respect to aiding and abetting inasmuch as  
20 the indictment does not charge or cite 18 United States  
21 Code, Section 2.22 Thirdly, your Honor, with respect to the  
23 example used by the Court with regard to inferences,  
24 and inasmuch as the Court charged that a conspiracy is  
25 usually a matter of inference, the defendant Mullenax

2 would respectfully request that your Honor charge the  
3 third paragraph in the supplemental requests to charge  
4 submitted by the defendant Mullenax.

5 THE COURT: Do you want me to charge on  
6 reasonable certainty?

7 MR. EHRLICH: The inferences must be consistent  
8 with one another.

9 THE COURT: Now you are modifying the request.  
10 Your request is wrong.

11 Do you want to give me a modified request or  
12 do you want me to do this impromptu? I don't propose  
13 to do any impromptu acting on this matter. Do you want  
14 to correct this third paragraph? You may go ahead and  
15 do that and I will come back to you.

16 MR. EHRLICH: Thank you, your Hon

17 Fourthly, your Honor, we except to the portion  
18 of the charge --

19 THE COURT: I am clear with you, am I not,  
20 that you are not requesting me to charge the language  
21 in reasonable certainty?

22 MR. EHRLICH: I would, your Honor.

23 THE COURT: You want that?

24 MR. EHRLICH: Yes.

25 THE COURT: I will not charge in the form

2 requested. I don't feel that I have to at this time  
3 prune out language for you.

4 Go ahead.

5 MR. EHRLICH: Thank you.

6 Fourthly, we would except to that portion of  
7 your Honor's charge that to pledge Select stock as a  
8 loan or as additional security is an offer of sale within  
9 the provisions of the security laws on the grounds  
10 related to the circumstances in this case and submitted  
11 in pretrial motions, and I refer to Mr. Segal's case,  
12 the McClure case.

13 Lastly, we would request that your Honor charge  
14 the two-inference rule.

15 Thank you.

16 THE COURT: I take it you don't desire to  
17 reframe any of your requests?

18 MR. EHRLICH: No, your Honor.

19 THE COURT: Mr. Lesser?

20 MR. LESSER: No objections and no exceptions.

21 THE COURT: Mr. Rhodes?

22 MR. RHODES: Your Honor, there is one point I  
23 may not have written down correctly, where the Court  
24 charged the jury relative to the reputation testimony.

25 I wrote down: You may consider that the defendant did

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2568

2 nct reveal to people his criminal conduct.

3 THE COURT: I didn't say that.

4 MR. RHODES: At any rate I point that out.

5 Other than that I have no objections or  
6 exceptions.

7 THE COURT: Mr. Berger?

8 MR. BERGER: Your Honor, in regard to the  
9 charge I object to the fact that there was an inference  
10 raised in the instruction that the crime of conspiracy is  
11 either worse or more dangerous than the substantive  
12 crime. I somehow got that inference from the instruction.  
13 I was not copying it down verbatim, but I did get that  
14 inference. I feel that that is objectionable.15 In addition to that, I believe that we would  
16 be entitled to instruction on the words "as of," as a  
17 legal matter, as I requested in my instructions.18 "As of a certain date," is a question of law and the jury  
19 should have been given some instruction with regard to  
20 that.21 In addition to that I would quickly request  
22 that if possible some instruction be given with regard  
23 to the grandfather clause exemption which I too omitted  
24 to include. I feel in the interests of justice it should  
25 be put in.

2 THE COURT: You had weeks and weeks and weeks;  
3 you had sufficient notice of the time when requests to  
4 charge were to be furnished, and there was not a single  
5 grandfather clause request by any defendant.

6 Is that everything on your part?

7 MR. BERGER: Lastly, simply the general objection  
8 that the requests to charge submitted by the defendant  
9 Rappaport were not given.

10 THE COURT: You can't throw in a blanket dragnet.  
11 Anything you have to say must be specifically called to my  
12 attention at this time, exactly what you consider you are  
13 entitled to, so I may have the opportunity before the jury  
14 goes out to consider what you are saying. If you are laying  
15 down some dragnet for appeal, this is the wrong time.

16 MR. BERGER: Specifically the two-inference  
17 instruction.

18 THE COURT: I have already announced on prior  
19 occasions that the two-inference rule is not the rule in  
20 this circuit.

21 Mr. Dulsky?

22 MR. DULSKY: I have one request, sir, and that is  
23 with respect to the matter of circumstantial evidence.  
24 I respectfully request that your Honor charge that the jury  
25 may not draw an inference from an inference; that the

2 inference may be drawn but it must be drawn logically  
3 and must flow from direct evidence -- not from another  
4 inference.

5 THE COURT: The charge on that score, I believe,  
6 is clear and adequate. I decline to charge the  
7 language suggested.

8 MR. DULSKY: I have no further requests, your Honor.

9 THE COURT: Mr. Concannon?

10 MR. CONCANNON: Nothing beyond Mr. Segal's  
11 objection, your Honor, which I join in, and beyond the  
12 requests of the defendant Vanasco to indicate to the jury  
13 the limited purposes of the evidentiary admissions  
14 concerning Karen & Company.

15 THE COURT: Mr. Rooney?

16 MR. ROONEY: We have nothing, your Honor.

17 THE COURT: Mr. Broderick?

18 MR. BRODERICK: Your Honor, I have no requests  
19 to charge, but I am concerned about the indictment  
20 situation. You mentioned in your charge you would be  
21 handing the indictment to the jury. Will you be handing  
22 both indictments to the jury?

23 THE COURT: What I will do is this: There is one  
24 single indictment now.

25 MR. BROKERICK: I was not aware of that.

1 pgas10

2 THE COURT: Since the body of both indictments  
3 was identical and there was only a difference in the number,  
4 the page number of the criminal docket is left off and  
5 Mr. Gardner's name is added to the list of those in the  
6 indictment; so only one single paper goes to the jury.

7 MR. BRODERICK: A consolidated indictment? It  
8 was just added --

9 THE COURT: That's not the way. There were two  
10 separate indictments, one naming Mr. Gardner alone and one  
11 naming sixteen defendants. I have now consolidated them  
12 into one action.

13 MR. BERGER: May it please the Court, I forgot  
14 one thing.

15 When the indictment goes in Mr. Rappaport's name  
16 will be deleted from counts 52 and 53?

17 THE COURT: You sent me a note during the course  
18 of the charge. I denied your motion to dismiss. I considered  
19 your application on reargument and denied the reargument.

20 MR. BERGER: That was the government's motion to  
21 reargue. My motion was granted by the Court and  
22 thereafter the government --

23 THE COURT: I did not dismiss any count as to  
24 any defendant at any time.

25 MR. BERGER: I don't know if a record was taken

2 on it. My opinion is that you originally dismissed  
3 counts 52 and 53. You gave the government an opportunity  
4 to reargue, and then you went ahead and said, "Reargument  
5 denied."

6 THE COURT: Mr. Berger, you are engaging in  
7 wishful thinking. I stated I denied the motion to dismiss  
8 and I would consider that tomorrow; that you handed that  
9 up as an application for reargument and I announced my  
10 decision, and that's the way it was and is.

11 MR. BRODERICK: Concerning the deliberation of  
12 the jury, the marshals -- this relates only to me because  
13 Mr. Gardner is presently incarcerated. The marshal is  
14 directed to close the door and everything else. I do not  
15 think there was any problem concerning the jury here,  
16 but I would say that if we could, I would like to have  
17 marshals that have not been in the courtroom that constantly  
18 guard the jury. I would not like to have that inference  
19 drawn here.

20 THE COURT: Is there anything else? I see you  
21 are back, Mr. Segal. Have you decided on anything? Is  
22 there anything you want to hand up? I don't want any oral  
23 conversation. This is a time when lawyers take the  
24 opportunity to try and get the judge into some kind of  
25 impromptu determination that has not been considered.

2 I worked on this charge for a week. I don't propose now,  
3 in a few minutes, to come to any decisions on matters  
4 that have not heretofore been submitted.

5 MR. SEGAL: Your Honor, my problem is that I have  
6 really tried to be right down the middle on this, without  
7 leaning one way or the other. I am just going to read to  
8 you what --

9 THE COURT: Hand it up to me. Don't read it to  
10 me.

11 MR. SEGAL: I will hand up two items, your Honor.  
12 If I may approach the bench I may be able to  
13 explain the second one.

14 THE COURT: Let me read it first.

15 (Pause)

16 THE COURT: Show it to the government.

17 (Pause)

18 THE COURT: Let me ask you this: We are talking  
19 about stock issued before the '33 Act. I don't believe  
20 that you can really mean that. Do you mean to say that  
21 Select stock was issued before the '33 Act? Select stock  
22 was the one that we are talking about.

23 MR. SEGAL: That's right, except we were getting  
24 into the Goldfield stock.

25 THE COURT: Throughout the charge I talked only

2 about Select. As a matter of fact, I think I mentioned  
3 Select right at the opening. I never mentioned anything  
4 at all about Goldfield and didn't intend to. I don't see  
5 how you can get the grandfather clause into this affair  
6 because Select was certainly a 1970 item and not a 1933  
7 and earlier item. I think it is just an error on your part.

8 My recollection is that right at the start of  
9 the charge on conspiracy and also again at another portion  
10 of the charge -- the entire context of the charge relates  
11 solely to Select. Here it is (indicating). Look here.  
12 I charged that the indictment charges that the object of  
13 the conspiracy was to obtain control of a Shell Corporation,  
14 Select Enterprises, Inc.

15 I did not mention Goldfield, but I mentioned  
16 Select right at the start of the conspiracy charge.

17 That's why I am puzzled by any belated reference  
18 to a grandfather clause.

19 MR. SEGAL: The Goldfield stock was issued in  
20 1915. That stock was what Segal put into the box with  
21 Boyd. The Select stock was transferred out of Goldfield,  
22 that 100 shares of Select. It was transferred out of  
23 Goldfield in 1970.

24 THE COURT: The securities violations related to  
25 Select Enterprises stock and th 's the only charge that

2 has been given.

3 MR. SEGAL: That charge I handed you doesn't help  
4 me.

5 THE COURT: Neither does it pertain to the case.

6 How about the first request? What about that?

7 MR. MAC DONALD: We oppose it, your Honor.

8 We don't believe that states the law. We cited in our  
9 originally proposed charge a decision which supports the  
10 charges drafted by the government. A pledge is a sale  
11 within the meaning of the Act, and although I must confess,  
12 because I didn't have that case called to our attention,  
13 I have not read it, but if that's the law of the Fifth  
14 Circuit, that's not the law here.

4/3

15 MR. SEGAL: They do distinguish other cases.

16 MR. MAC DONALD: It is obviously private  
17 litigation, and it is not a United States versus somebody  
18 else, and without the facts and circumstances of it before  
19 us it is difficult --20 THE COURT: Let me say this: I decline to charge  
21 in the language of a supplemental request, number one,  
22 because the matter is submitted untimely; secondly, because  
23 on inspection of the item it raises questions of law that  
24 cannot be solved on horseback here.

25 There was no similar request relating to the

2 subject matter heretofore submitted to me.

3 MR. SEGAL: For the Court's edification --

4 THE COURT: I would like to mark this request  
5 that you have submitted as a supplemental request as  
6 Court Exhibit 50-A so that it goes with your requests.

\*\*\*

7 (Court Exhibit 50-A marked.)

8 MR. SEGAL: The McClure case is 492 Fed. 2d 490.

9 The Court may take a look at that after the jury goes out.  
10 It is there.

11 THE COURT: Let me just go down the various items.

12 Mr. Concannon, what was this that you put forth  
13 about the limited purposes of the admission regarding  
14 Karen & Company?

15 MR. CONCANNON: I submitted just that one  
16 request. I asked the Court --

17 THE COURT: If it is in the requests, let me look  
18 at it.

19 (Pause)

20 THE COURT: I decline to charge in the language  
21 charged in Court Exhibit 48 for identification, which was  
22 the Vanasco request to charge, except as already contained  
23 in the body of that charge.

24 I decline to charge as requested in the other  
25 respects except as already contained in that.

1 pgas16

2 Under those circumstances, I will recall the jury  
3 and advise them that I have no further additions to make  
4 to the charge.

5 MR. ROONEY: Are you going to discharge the  
6 alternates?

7 THE COURT: I am going to discharge them. Why?

8 MR. ROONEY: Maybe I misunderstood you. I thought  
9 they were going to deliberate as a group.

10 THE COURT: I told them not to deliberate until  
11 I recall them.

12 The Court declines to charge as requested in  
13 supplemental request number 2 by the defendant Boyd on two  
14 grounds: First, the stock involved in this case is the  
15 Select stock; secondly, the request to charge is  
16 incomprehensible.

17 (Jury in box)

18 THE COURT: I have no further additions to the  
19 charge. I will now ask the clerk to swear the marshal.

20 (Marshal sworn)

21 THE COURT: The alternates are excused with the  
22 special thanks of the Court for their faithful attendance  
23 and ability and willingness to serve. Fortunately, we are  
24 all in good health and all prepared; the jury is ready to  
25 deliberate. Please go to room 109 and pick up your

2 certificates of service. The clerk down there will give  
3 them to you.

4 (Alternates excused)

5 THE COURT: Now, Mr. Foreman, I have here twelve  
6 copies of the indictment and twelve copies of a verdict  
7 form and the original of the indictment. The jury may  
8 wish to use these to make its notations.

9 Bear in mind what I said about each count  
10 to be separately considered as to each defendant, and the  
11 evidence in connection with that count separately considered  
12 as to each defendant. This has been set up for the  
13 convenience of the jurors in following the names. I have  
14 put them in alphabetical order for convenience in finding  
15 their names, whereas you will find in the indictment  
16 they are in a different and not alphabetized order. There  
17 is no significance in that. This is just a setup, the  
18 verdict form, for convenience. The marshal will give  
19 those to you, and also paper and pencil.

20 You may now go to deliberate.

21 (Time noted: 11:20 a.m.; the jury left the  
22 courtroom to begin its deliberations.)

23 THE COURT: Gentlemen, some modus operandi has  
24 to be developed in connection with the exhibits. I hope  
25 it does not occur, but if there is any call for

2 redacted exhibits there will be a problem of making sure  
3 that the redaction has been made before the papers are  
4 sent in.

5 As to the other exhibits that are in evidence,  
6 it will be my suggestion that you eliminate from your  
7 piles of original exhibits those that have been marked  
8 only for identification and are not in evidence, if there  
9 are any, and put them aside in a separate file drawer,  
10 perhaps, so that we don't, inadvertently, get an exhibit  
11 before the jury that has not been in evidence.

12 The clerk has a list of all of those that have  
13 been marked only for identification and you are to check  
14 with him now and prepare a list of those to avoid error  
15 later.

16 So far as standing by, I think that for the  
17 first half hour, against the possibility that some thought  
18 may strike somebody about some exhibit that he or she may  
19 want, I would suggest everybody remain conveniently near  
20 to the courtroom. Then, after that, we will let the jury  
21 deliberate until the usual time and arrange with the  
22 marshal to see to it that they go out to lunch at about  
23 a quarter to one. At that time they can probably get into  
24 the restaurant at one o'clock and, hopefully, back at two.

25 Counsel can guide themselves accordingly, that

2 they will be sent out at about that time. There won't  
3 be any necessity for attendance in the courtroom room.

4 Beyond that, if there are any lawyers who have  
5 any special problems that will have to be attended to and  
6 they desire, with the consent of their client, and the  
7 client of a cooperating lawyer, to have somebody cooperate  
8 and stand in for the lawyer who has to unavoidably leave,  
9 that would be satisfactory as far as I am concerned.

10 However, the person who is your designee will  
11 have to have full authority to deal with any jury requests  
12 or matters that arise during your absence.

13 We are generally on duty until the jury comes in.  
14 We will decide what is to be done as the day wears on.

15 Supplemental request number 2 by Mr. Segal will  
16 be marked as Court Exhibit 50-B.

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17 (Court Exhibit 50-B marked.)

18 THE COURT: All the requests that have heretofore  
19 been handed in have been marked as court exhibits and  
20 were turned over to the clerk.

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jb-5  
postcharge  
10-17-75

1 jbs-1

2 (Note received from the jury at 12:20 p.m.,  
3 marked Court Exhibit 55.)

4 (In the courtroom, 12:30 p.m.; jury not present.)

5 THE COURT: I have a note from the jury which says,  
6 "Could we have Sections 1001, 1341 and 1343 of Title 18,  
7 United States Code, and Sections 77-E, 77-Q and 77-X of  
8 Title 5 of the United States Code."

9 What they want is statutes that have been read  
10 in the course of my charge. Now, I have here the government's  
11 request number 8, which sets those statutes forth without  
12 comment and I think that that probably can satisfy the  
13 request, so I will hand you a copy so that you can examine  
14 it and then we will compare it with the requests to see  
15 whether we have all of them.

16 Where did the Sections 77-E and 77-Q come from?

17 MR. SUSSMAN: Perhaps from the indictment, your  
18 Honor.

19 THE COURT: Yes, but are they reflected in the  
20 charge?

21 MR. SUSSMAN: Yes. Section 77-E is Section 5 and  
22 77-Q is Section 17.

23 MR. CONCANNON: Your Honor, would it be your  
24 intention to give copies to them or to read it to them?

25 THE COURT: No. They want a copy of that and I

1 jbs-2

2 read that. That is the charge on that point. Please don't  
3 ask me a lot of questions until we locate things. Let's  
4 try and do this thing orderly.

5 MR. MACDONALD: Judge, this is the codification of  
6 Section 5, which is what E refers to.

7 THE COURT: 77-X is a penalty section and I don't  
8 propose to send that to them at all. That is the penalty  
9 for a violation, but 77-Q is the one that they are talking  
10 about and that is 17-A of the Securities Act of 1934.

11 I suppose what we could do is just cut those  
12 provisions out.

13 (Pause.)

14 THE COURT: Look at those, gentlemen, and see  
15 whether you agree that these may go in this way. I have  
16 just cut them out and cut all the explanatory talk off and  
17 left the statute there.

18 (Pause.)

19 THE COURT: It shouldn't take any time here. This  
20 is exactly what I read in the charge. I have taken the other  
21 explanatory material off the sheet. When they asked for  
22 77-X, I will send that note in there, that they have no  
23 business with that penalty section at all.

24 MR. EHRLICH: I object to the submission to  
25 the jury on the following grounds --

1 jbs-3

2 THE COURT: To the submission of what?

3 MR. EHRLICH: Of those.

4 THE COURT: Of the statutes requested?

5 MR. EHRLICH: Yes.

6 THE COURT: You realize that they are in haec verba  
7 exactly what I read to the jury in the course of my charge?

8 MR. EHRLICH: Yes.

9 THE COURT: And you object to it?

10 MR. EHRLICH: Yes, and I would like to state that  
11 the statutes as they are contained do not cover elements of  
12 knowledge, intent and wilfulness. Now, when the jury  
13 receives the statutes, they may erroneously rely that all the  
14 elements of the offense are contained in the statute and I  
15 believe that it must be put in the context of the Court's  
16 charge.

17 THE COURT: Is there any objection from any other  
18 counsel?

19 MR. SEGAL: Your Honor, I would prefer if the  
20 Court would read to the jury, rather than having the jury  
21 use those statutes. I am afraid of their use of the statutes  
22 as quasi lawyers and I just wonder whether or not the Court  
23 could not just reiterate its charge to them in regard to the  
24 statutes.

25 THE COURT: Well, it is perfectly apparent to me

2 that in reading the indictment, the jury has found these  
3 references and what they want are the extensions of the  
4 references. Now, is there any reason why the jury should not  
5 have both the verbal and the written form? The remark that  
6 Mr. Ehrlich makes is completely out of order in my judgment.

7 MR. SEGAL: Your Honor, I don't have 18 with me and  
8 I just wonder, the sections which indicate that there have  
9 been redactions, do they eliminate any items which would be  
10 relevant to the --

11 THE COURT: Wait a minute. What sections which indi-  
12 cate redactions? This is the way I read them to the jury.

13 MR. SEGAL: There are dots indicating that something  
14 is left out.

15 THE COURT: Yes. There is nothing in the redacted  
16 portions which bear on this. I will give you an example here.  
17 I have Title 18 here.

18 Show Mr. Segal the Title 18 request. Let him see  
19 these three requests.

20 (Pause.)

21 MR. SEGAL: I don't have any problem, your Honor,  
22 with what is omitted from the 1341.

23 THE COURT: The omissions are unnecessary words  
24 for the statute, isn't that right?

25 MR. SEGAL: Yes.

1 jbs-5

2 THE COURT: I will accordingly transmit to the jury,  
3 in response to its request, these items, which are now deemed  
4 marked Court's Exhibit 55(a).

5 Mr. Berger, at a quarter of one on October 17,  
6 1975, during the course of the deliberations of the jury, I  
7 received Court's Exhibit 56 from Mr. Berger, stating that  
8 the Defendant Rappaport respectfully requests a mistrial as  
9 his decision not to put in an affirmative case and the closing  
10 argument were both predicated upon the belief that the Court  
11 had dismissed as to Mr. Rappaport Counts 52 and 53 of the  
12 indictment.

13 I think that the motion is absurd, particularly  
14 with reference to the three places in the record that Mr.  
15 Berger himself called to my attention, namely, the denial of  
16 a dismissal of Counts 52 and 53 at stenographer's minutes,  
17 page 1731, the repetition of that denial at pages 1756 and  
18 1757 and the repetition of the denial again at page 1920.

19 These notes are marked Court's Exhibit 56. The  
20 motion is denied. At no time was there even a scintilla of  
21 a suggestion of a grant of the motion.

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2 AFTERNOON SESSION

3 (Time noted: 2:35 p.m.)

4 THE COURT: I am going to send this note in with  
5 the exhibits. It reads as follows:6 Jurors: The SEC testimony is in volumes that  
7 would have to be edited. If any part of that is desired  
8 it will have to be read to you. Consequently, those  
9 exhibits are not now included in response to your request.10 I take it, gentlemen, there is no objection to  
11 that note; is that correct?

12 MR. GOLDMAN: The only thing --

13 THE COURT: Don't say "the only thing." If there  
14 is an objection, that's what I want to hear.

15 MR. GOLDMAN: There is an objection.

16 I think you might broaden that to include the  
17 Peterson depositions which the government said they were  
18 not going to offer at all other than what they had --19 THE COURT: You mean the SEC testimony and the  
20 depositions?

21 MR. GOLDMAN: And the depositions.

22 THE COURT: I will write this: And the depositions  
23 are in volumes that would have to be edited. If any part  
24 of that is desired it will have to be read to you.  
25 Consequently, those exhibits are not now included in response

1 pgas2

2587

2 to your request.

3 Is that satisfactory to everybody?

4 (Pause)

5 THE COURT: There being no objection, that will  
6 be given to the marshal together with the exhibits.

7 The note from the jury is marked as Court  
8 Exhibit 57. This note reads as follows: Please send  
9 government exhibits.

10 The note is signed by the foreman.

11 (Court Exhibit 57 marked.)

12 (Time noted: 2:40 p.m.)

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2588

## EXHIBIT INDEX

	<u>Court</u>	<u>Identification</u>	<u>Evidence</u>
2			In
3	50-A		2576
4			
5	50-B		2580
6			
7	55		2581
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
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